







Johnson Collection

v. 4



1919  
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## Contracts.

of Judge Gould. April 10<sup>th</sup> 1847.

A Contract, as the term is understood at C.L. is an agreement between two or more parties upon suff<sup>t</sup> consid<sup>n</sup> to do or not to do a particular thing.

Upon the prin. of genl law, or in the orig. nature of the thing, the consideration makes no part of the contract - but at C.L. it is absolutely necessary to its existence 2 Bl 442. 1 Pow 864.

The term "Contract" in genl<sup>l</sup> acceptation relates as well to agreements as covenants as to gifts, grants, leases &c. as to those which are executory as covenants, promises &c. - for in both cases, there is a consent of the parties to an agreement respecting some prop. or right which is the subject of the stipulation - But the term is generally considered as relating to mere executory agreements 1 Pow 7.

As a contract is an agreement, there must necessarily be an assent of the parties to it, & this assent is of the essence of the contract, for there can be no such thing as an agreement without a mutual assent, nor of course any alleg<sup>d</sup>. 2 Bl 442.



Who may Contract.

It is here observed

that a person who is non compos as an idiot or a Lunatic cannot regularly make a binding contract, for such persons in legal judgment have no understanding and no will & of course no capacity to assent or dissent. Contracts therefore contracts not of record made by such persons are absolutely void. 4 Co 123 125. 2 Pol 723. 1 Bow 11. 12.

None if an idiot or Lunatic is a partic tenant with a written grant remains under over a surrender of the partic estate by him does not destroy the written grant. The surrender being void does the partic est. is considered as abiding in him. But such a surrender by a person who had capacity and destroy the same. 2 Sal 576. 3 Mod 296. 301. 2 Lev 284. 2 Vent. 198. Garth 211. 250. 435.

Whether to the deed of an idiot or non compos factum may be pleaded, the ancients were agreed. But it is pretty well established that the deed of such person is void, & not merely voidable. It is not necessary that non compos factum might be pleaded. But the rule that this plea is good, to a void contract is not universal in a case of a power of attorney an Infant. and is void, nor can fact be pleaded. 1 Bow 11. 12. 4 Ma 27. 2 Pol 723. 2 Sal 675. 4 Co 123. Stra 1104. 2 R. M. 1172.

But persons of other



Contracts } The description are capable of receiving  
 prop. by a derivative title, as by gift, devise,  
 grant, descent &c. because says Black. there  
 is a presumed assent on their part as to  
 their estate, when ever "presumption of  
 Beneficial to them - but this is rather a hard  
 to say that the law implies an assent of  
 them persons when it presumed are incapable  
 of assenting. It is not more proper  
 to say the law disposes with their assent  
 in those cases which are considered as before  
 beneficial to them. Inst. 2. 6. 1. Inst. 12. 13. 3  
 Op. 34. 2. Inst. 2. 13.

And if one who is a devisee or  
 donee reverses of his insanity & agrees to the  
 purchase; his assent becomes binding, but  
 if he dies during his insanity, or having re-  
 covered, dies without assenting, his heir may  
 void it, <sup>and</sup> at pleasure it can.

But the court of ex-  
 chequer has said that a Lun. alien his prop. or to create an  
 oblig<sup>n</sup> upon himself, comes within the  
 rule & is void.

And then however it seems to be a rule of  
 C. L., that the non compos, cannot after  
 his recovery take advantage of his incapacity  
 himself. Thus if a Lun. who give a bond  
 to perform and recover his understanding he could  
 not plead non est factum, or in any other  
 way avoid it, for it is a maxim of Law that



4  
The man of full age shall satisfy him-  
self - The law on the subject is controlled  
by the the current supports the above but C.  
398. 622. 4 Co 123. Let see 405. 1 Dow 14. 26. 1 Donell  
11. to 43. cases. 2 Vent 198. Lke 404. B. N. D 172.  
This rule it must be agreed appears to be  
very arbitrary - it is founded on the supposed  
reasons of protecting the parent's fund, by pre-  
vented insanity, but such cases are extremely  
rare, & there is great difficulty in thus  
imposing upon another for any length of  
time 3 Ba 37. 4 Co 124-5.

This point has several times arisen in  
Cm. & at length was solemnly decided in City  
Errors. That the non. comp. may avoid his  
act or contract by averring his incapacity. 2 Day  
90.

and at C. L. on the death of the non. comp.  
his heir or executor may avoid his act &c. by  
averring the insanity. Now how any possible  
injury is done from suffering the non. comp. him-  
self to avoid it, then arise from this can I  
cont. see C. L. 125. and C. 398. 3 Ba 37. & the matter  
however is well settled.

There are two modes  
by which these contracts may be avoided at C. L. but  
the law of non. comp. 1<sup>st</sup> After office found  
on the writ de idiotia, or lunatico, in quibus  
cibus, the thing is kept. Executive of any county  
or person having may by see. to avoid any







If a lunatic makes a contract  
in a lucid interval he is bound by it &  
so are his rep<sup>s</sup>, for at the time of making  
the contract he was understood in capacity.  
203. 4 Co 125a. 2 Vern 412. 414

And both Lun. &

Id. are bound by acts or contracts of record, as by  
Jury tried or com<sup>on</sup> recoveries suffered. & so also  
are their rep<sup>s</sup> bound. For to allow the incapacity  
to be to impeach the judgment, & the pres-  
umption of Law is irresistible, that when  
a person of full age makes a contract by or  
he was of capacity. 1 Inst 244. 10 Co 42. 416  
124.

An Idiot by the way can never have a  
lucid interval. He is termed a natural  
fool - a person who has no understanding  
from his nativity, & is capable of ac-  
quiring any. It is said in the books of L<sup>r</sup>,  
that a person who has any understanding  
whatsoever, if he can tell his own age,  
the names of his parents, the days of the  
week, or can count ten, is not an  
Idiot. but he may be a non compos.  
3 Pl 99. 1 Pl 303-4. 1 Inst 283.

A Lunatic is one who has had under-  
standing, but has lost it from some super-  
venient cause; & so the recovery may & often  
does happen from the cure of the disease. 1 Inst  
24. 4 Co 125. 1 Pl 304.



Who Can't Understand

Intoxication the

apparently a temporary insanity, is not  
of itself, either at Law or in Equity a suff.  
ground on which to avoid a contract, for such  
a man says to take a voluntary action  
& the notion of it will be in him, that a  
person capable of understanding is capable  
of contracting. But that he shall not have  
his want of understanding. - This rule  
will settle <sup>as</sup> the case Supp. 2 P. 1781. 1443 19.  
2 L. 462. 1 Dow 29. 30. contra B. & P. 172. The  
Rule is merely that the want of under-  
standing is not for a suff. to avoid the  
contract. That if one person draws another  
into a state of deep intoxication to  
obtain a contract from him, Equity will  
set it aside, on the ground of the fraud  
& on this ground only 2 P. 1781. 1 Dow 30.

1730 a party

being of age & understanding is not for a suff.  
ground for setting aside the contract,  
unless the degree of incapacity be such  
as amounts to total incapacity. - For with  
the aid of the Law of Equity distinguishes  
all between the slight degrees of incapacity  
& of wisdom in the human mind, the  
only distinction the Law recognizes, is that  
between minds sane & non sane, or even less  
than even pos. 2 P. 1781. 1 Dow 30. 31. 65.



But if any fraud or imposition,  
has been practiced upon a person of a  
weak mind, the Court will lend aid  
in Equity. And if there are any circum-  
stances warranting the suspicion of fraud the  
issue will be affected. For such persons are usu-  
ally easily managed, so that the business may  
be conducted in such a manner, as to evade  
detection of the fraud. & Nov. 22d. 3 PM 1899.

Court made  
by agents upon the same yet priv. of the  
incapacity to agent. & est. for receipt are  
regularly not binding, & even those receipts  
are frequently not. & this exception as to  
receipt is founded upon receipt only. In  
this infant has no legal discretion in any  
physical power to make a contract in the  
Court of Equity.

At Law. contracts also & regularly  
incapable of making a contract. & the reason  
on the supposed want of physical power  
but from a moral or legal incapacity  
& hence it is that her contract in general bind  
neither herself or husband. But to uphold  
the true reason for the disability of the wife  
is her want of judgment or power to contract  
it. & the intervening rights of her husband in  
the law & equity. Pa.

If a tenant in fee agrees to alien  
his lands, he is bound by the contract. But if



Who. Court } it is to the disinclination of the judge  
in tail. & he will compel him to suffer a new  
use or give a fine for the inheritance in tail  
is in his power. & tenancies in tail are not  
favoured 1 Ch. Ca 171. 1 Dow 112.

This rule has no immediate relation, to  
of the incapacity of operating to create. But  
to the power which one person has in certain  
cases to bind another as well as himself

Thus a cestui que trust may  
by an agreement with the trustee is not a  
party, bind the trustee as well as himself  
& he will compel the performance. The ces-  
tui que trust has the beneficial interest in  
the trust only the legal title, so as the trustee  
has no interest in the estate to be affected he  
will be compelled to transfer the legal title  
1 Ch. Ca 143. 208. 1 Dow 112-3.

The trustee may also  
in some cases bind the interest of the cestui  
que trust by his own agreement he having  
the legal title & all the evidences. as, by a con-  
veyance to a bona fide purchaser, without  
giving notice of the trust, here the person  
shall hold to the exclusion of the cestui que trust.  
For the right of the bona fide purchaser is  
not to be affected by any secret right of which  
he had no knowledge or means of knowing of  
Secret. g. trust is here left to his ac. eye the  
trustee. & this is a rule which must always attend



attend the convey. in those countries where there  
is no rule w<sup>ch</sup> of the title as there is in this  
state, there may have been recorded. 1 BR. 435. 403.  
44. 689. 404 515. 1 BR. 434. 447. Dow Pr. 295.

And finally  
an ancestor raised in the way a question as to  
his estate & thus binds his heir, or if the ancestor  
die before making the convey. & the title des-  
cends to the heir, the heir will be compelled by  
eq. to perform the agreement. 2 Vern 213. 1 Dow  
115. The reason is obvious - at the time of  
making the agreement, the whole estate both  
legal & equitable at Law & in Eq. were in  
the ancestor & the heir had no title in ex-  
relation, so that the title of the purchaser is  
prior to that of the heir & of course better  
than his.

On the other hand if a tenant say that of-  
ficially alien his estate & dies without suc-  
cessing it, his issue will be compelled to execute  
w<sup>ch</sup> for this claim per formam doni independ-  
ent of the tenant in tail or ancestor, though  
him indeed but by a right acquired by the  
original purchase or grant, and tho' the tenant in tail  
might have devised the entail still his  
agreement to do it will not deprive the  
issue of their legal right. 1 Lio 238. 9. 2 Vent.  
359. 404 203. Pr. 424. 2 Veg 34.

But if upon such agreement of that  
in tail, the issue have received the consideration  
they



Over to line others, they may be compelled to  
the death of an estate to carry the agreement into  
effect by making the new conveyance. For  
if they take benefit of their part of the contract  
they shall execute the other part. 1 Eq. Ca 186.  
1 Pow. 126.

There are certain cases in Equity in which  
a Parent under certain circumstances may  
make a contract binding upon his minor child  
even as to the land. When Equity cases in Eq.

To allow the con-  
tract of a woman made before marriage during  
coverture the husband afterwards marries  
for as he takes part of her property absolutely  
he deprives her of all power over the rest & as  
his right suspends her liability he should be  
liable on her contract. on the max. that state  
the wife cannot overrule her husband. 2  
vern 448. 1 Bro 556. 10 Mod 180. 243. 1 Pow 123.

Genl. speaks.

The contract which a man makes after his death  
binding upon his Exors & Adors, or in the language  
of the general, the Exors & Adors of every per-  
son is implied in himself, that is, they are  
bound of course & by operation of law, that  
they are not mentioned, but this is not im-  
material for there are fiduciary contracts  
which are not transmissible 1 Bro 197. 1 Pow 125.

Now for the

in what cases an atty agent &c may bind his



his principal by contract made for the latter  
see *Mast. & Lark* 100. 1 *At. Int. rule* 110  
124. 3 *Port 277*. 2 *Vern* 127.

If a joint tenant agrees  
to alien his part of the estate & dies before  
performance, his survivor can sue  
to the performance, but he may take whole  
by survivorship, for his claim arose at  
commencement of the estate. *45. Prior* as to the  
whole, to that of any subsequent purchaser  
as to a part. 2 *Vern* 63.

It is said to be an exception to this rule  
that if the agreement amounts to a severance  
of the estate in Equity, but what constitutes  
this severance we have no case on  
dividing it. 2 *Veg* 34. 1 *Port* 129.

### Of aspending to Contracts

The agent of a  
party to a contract may be either express or  
tacit—sometimes called "implied".

An ~~agent~~ <sup>agent</sup> ~~agent~~ <sup>agent</sup> needs a definition. It is that which is  
given by some sign intended to signify it  
as speaking, writing & even a gesture or a  
nod is sufficient. This agent may be either  
precedent or concomitant, or subsequent,  
to the principal act. Thus if a man gives a  
quitance to a Lev. to purchase goods upon trust,  
it is an agent precedent. — If he buys



of intent to look } buy prop. himself & at the  
time of the purchase agrees to pay. that  
is a concomitant. — If a third or str  
anger makes a contract for an other without  
knowledge and the latter afterwards adopts  
& ratifies the contract it binds him, being  
an agent subsequent.

Faith or implied assent  
may arise in several ways.

1<sup>st</sup> It can be implied from mere silence  
inaction, as if a prior Mortg. being present  
when the Mortg. is contracting for the same Mortg.  
of the same subject, & knowing that such a  
contract is about to be made, is silent, it gives  
no information of his own incumbrance  
he loses the priority of his own Mortg. on  
the implied contract. That it shall be post  
poned, 2 Vern 151. 1 PM 293. 1 Vern 370. Cow M. 188.  
Wray C. 1 Bos Ch. 57.

In this case the first mortg. might be postponed  
on the ground of fraud, but the implied con  
tract is suff. for the purpose. The rule is  
applicable as well to leases as mortg. 2 Vern  
229. 1 Eq. Cas 55. Cow M. 83. to 185. 2 Vern 150.

But to raise an implied  
assent in the person to be affected by it, it con-  
veys not only that he should have known of his  
own claim and interfere with the subsequent contract,  
but also that his silence was voluntary for



for if he was awed into silence, the presumption of a secret is not raised, or rather the law would not raise the presumption? 11 Bow. 134.5.

2<sup>d</sup> Is a general rule the Law will raise a tacit agreement when it is necessary to carry into effect some principal contract founded on an express agreement? as if I make a contract to sell him the timber on my land, the implied agent is raised, that I am to suffer him to have free access & egress. So if I let a chamber in my house, but there is no separate passage - or all one acre of land which lies in the middle of my farm in this case, I allow him implicitly a right of way, over the most convenient place &c. 1 Inst 56. 2 Pl 353.

3<sup>d</sup> There is one species of tacit agreement, which is annexed to all agreements whatever. This, that if one party fails to perform his part of the contract, he will pay to the other all the damages which are sustained by the non-performance e.g. a contract to build a house & pay fails to do it. - And this is the principle on which all suits are brought for Breach of Contract, on the contract. 2 Bur 104. 3 Pl 158. 1 Bow 127.

When one employs another to purchase goods for him on credit, by a general agreement, he tacitly agrees to be bound by all contracts of that kind which the latter may afterwards make in his (the first) name, see Mack & Ser.



Spent. Blount's? Serv. pa.

1 Par 108.

and an conveyance of property, surrender, gift, grant &c. there is a tacit assent to the conveyance, with part of the purchaser, unless the contrary appears. for a man is supposed to assent to what is advantageous to him. Thus if a conveyance is made to a man who is absent, & the deed is delivered into the proper office to be recorded. Now all is done to render it binding as far as can be done, - & the estate vests immediately in it. and if a husband is committed on the land he may on his return sue to have the acts for it. I never see the rents & profits. But he may if he please refer to the purchaser if he does it reverse. - There is also the case with devisees, this assent is implied. 2 Leon 233. 3 Co 25. 27. 1 Stra 165. 4 Day 398.

The rule is the same as to the heir at law. His acceptance of the property descended to him is presumed as if immediately on the death of the ancestor to whom it is committed. And he is answerable to all acts done in his name, though he did not assent to the same. 1 Par 139.

There is a variety of cases mentioned, in which the husband is presumed to assent to a contract made in his name by his wife, see Par on 4 Bond. pa.



And upon the sale of a free chattel  
there is always an implied warranty in the  
words that the title is in him, unless it con-  
trary appears, as it would of a horse. But there  
is not at all any implied ~~and~~ warranty of  
soundness as has sometimes been said is  
the case, 3 R.R. 5; Esp. 232. 13 Wall 143, 379.

What will invalidate an agreement actually made.

It is said  
above that there can be no contract without an  
agreement, & that agreement is usually binding. But  
there are cases in which it is void or voidable  
the actuality given, as, in the first place,

Ignorance or Error will  
in some cases invalidate the agreement given to  
a contract. & particularly if the mistake or error  
of the one party as to his own rights was occa-  
sioned by the fraud of the other. And the court  
will not be bound in this. It is said indeed - & of  
language is correct enough - that the contract is  
invalidated by the fraud - the fraud disproves  
the fact of a legal & binding agreement, when the  
fact at law was made to believe the truth of  
his assertion was duly executed when it was  
not. And he releases his interest for a small com-  
pensation - the release was set aside - for he never  
intended to release his interest on the supposi-  
tion that he had any, but on the ground that he  
had none, the will being good. 1 R.R. 329. 10 Wm 19-20  
4 Vinier 534.



What must be a Court? But in case of  
a question of right as to which both parties are  
ignorant, on which side the right lies, & a con-  
tract is made by which the party on whose side  
was to right, becomes a loser, it is binding  
for him. There is no fraud, & they come to the  
agreement on the ground that one of them  
must be a loser, therefore no evidence shall  
rebut the legal effect. It is nothing more  
than a case of com. compromise - & cannot  
be set aside either at Law or in Equity! 1 Mr  
226. 30th 587.

But if the party really entitled is  
"ignorant" as Powell says "as to the extent  
of his right & of the means of informing  
himself he is not bound by the agree-  
ment by ignorance of the extent he must be  
meant ignorant of some material mat-  
ter of fact, as of the value of the prop.  
contracted about. An ignorance of the law  
cannot be avowed, And thus we infer  
from the case cited, it was where a daughter  
not knowing the value of her orphanage right  
but supposing them to be worth £10,000, she  
accepted the £2,000, but then, when their true  
value appeared to be £40,000. - on this ground  
she was released from her agreement & a dis-  
tinction seemed. 3 Mr 316. 2 Bow 199.

On this point  
of mistake, there is a case recognised as



as law. & we cannot be accounted for on any  
general principle. The singularity of the case attracts  
much of the attention. It is that of Land  
own vs Land down, often called the schoolmas-  
ter's case. A died leaving two brothers, the first  
died to whom it descended? No legal assistance  
being at hand appl<sup>n</sup> was made to the School-  
master, who having read that Land's descent  
was perpetuum decided the estate belonged  
to the younger brother. Now here both parties  
are without any fraud being practiced, decided  
by another a third person — The misapprehension  
is on a point of law, the agreement made be-  
tween the brothers in pursuance of the School-  
master's decision was set aside by Ch. Now this deci-  
sion of Ch. court is reconciled with any defini-  
tive principle. It is a rule of law, that ignorance  
of the law excuses no man. 2 How 196. Moseley  
354. 2 East 467.

Wagering Contracts are in genl. kind?  
at C.L. & it is not essential to their validity  
that the event upon which they depend should  
in themselves be contingent, it is suff<sup>ic</sup> if  
they are to equally uncertain to both parties  
at the time. In the case ignorance does not  
invalidate the agreement. Cow 37. 2 D.R. 670. 3d.  
698. case, a wager contract made on the expression  
of the King of Sicily.

There are also cases in which the  
agent of an intended purchaser of an estate







stipulated; the subject shall have certain  
qualities or incidents. The absence of these  
incidents will invalidate the agent.  
In some cases the intention of the parties  
may be inferred from the circumstances, thus  
a horse is sold for a price which it is not  
worth unless it were sound. The want  
of assent of purchaser may be inferred from the  
fact - Now such a proposition is true even  
in the work of an accusa. & an acc. & an  
inaccountable there is no sense  
of law about it. There is nothing in the Cook  
case supportive of it not only so but it is directly  
against law. But if defects known to vendor were  
concealed, a qualification more fraudulently rep-  
resented - recovery might be had on the im-  
plied warranty. Pow 150. Lush v. Cross 10  
818. Long 23. 10 R. 123. 9 L. 354. 10 R. 115.  
10 R. 2 East 314.

Now this is a case from being law the purchaser  
cannot recover a farthing by way of compensa-  
tion for damages, there being no fraud  
the maxim caveat emptor perfectly applies  
He should have taken a warranty & as he did not  
he must abide the consequences

In law it was long held that if



Whitwell's case, the paying a round price  
raised the implied warranty that the prop-  
erty was sound. — I contended a.g. 40. prin. for  
12 or 12 years. At the first time I had an assign-  
to appear in the opposite side, the 2d adp.  
to the C.C. 2 Proot. 407. 2 Swift 120. 150. —

Of the subject of cont. i.e. the sub. mat. of them.

The enquiry  
is in relation to what subject contr. may be made  
so as to bind the parties.

And I premise on 40. subj. that there is a distinc-  
tion in 40. law between contr. execut. & contr.

which are executory. I do not here intend to dis-  
cuss this distinction, see how far. But, I want

execut. to one who takes a right or interest to-  
gether with immediate prop<sup>y</sup>, or, an indefeas-  
ible right of future prop<sup>y</sup>.

Now executory contr. creates indeed a right or ally<sup>n</sup>  
but it is never attended with immediate prop<sup>y</sup>  
it is introductory to a contr. yet.

Now no one can by a contr. exec. convey a thing  
in which he has no actual or potential interest  
at the time, — for <sup>he</sup> cannot transfer in present  
that which he has not. 1 Dow 432. 1 Rob 132. 1 Inst.  
309b. 1 Pow 152.

The subject of an exec. contr. must be  
one in which the party making the contr. has an  
actual or potential interest at the time of mak-  
ing it. If then one makes a bill of sale



sale, or grant, ~~etc.~~ in presence of all the ~~etc.~~  
or wheat, <sup>which he may acquire</sup> by such ~~etc.~~ is void, for there  
is nothing which the court can act. it acc.  
to in case of a convey. of all the land he shall have  
during his life 10 years.

Suppose if one of two joint tenants makes a deed  
of the whole of the joint estate, & then he survives  
the co-tenant the moiety of his co-tenant does not pass  
by the deed but remains in the co-tenant by the  
survivorship notwithstanding the deed because at  
the time of making the deed he had no interest  
in the share belonged to his co-tenant 1 Pow 102.

Upon the same prin. if a man sells a horse  
to B. in condition of paying being made in 6 days.  
It cannot in the mean time make a valid sale  
of the horse, & such a purchase not be  
valid if at the expiration of the six days the  
purchaser B. fails to pay. 12 Mod. 100.  
174. 100.

Now can one make a grant in present of a subject  
in which he has an inchoate right to be perfected in  
future, as in case of a contingent interest in an  
son his marriage, & before the event the transfer  
is in void, it will not pass. Now for  
such as a grant made in 10 years to be considered  
as void of an executory contract is not for one to be con-  
sidered in this place. 40 R. 245. 100. 100. 100.

But a thing  
of which one is potentially owner at the time  
in which he has a potential interest in some  
thing



July 2<sup>d</sup> of 1845. { something an empty, an incident to  
or arising out of another thing actually, as he  
at the time in the party making the contract  
may be the subject of a contract executed, this  
arising to the rule alone of a grant to B. all  
the wood he shall purchase in a given time  
by a contract etc? - it is void. Still a grant of  
all the wood or grass that shall grow on the  
land in a given time is good. To have an  
incident has the subject out of view the sub-  
ject stipulated about is to arise in the  
a word to be potentially owner of it. Thus the  
Law recognizes the transfer as a good one  
to B. 13. 14 Nov 1845 - Later the sale of the  
offspring of one animal - of his cow, or of  
the feathers of his goose are good.

But contracts, by  
tho. not made either actually or potentially  
may be the subject of a contract. For there  
are but 2 kinds of things preparatory or future  
to the thing to be conveyed, and in  
this case there is no incongruity. Thus if a  
contract to convey, all the land now and  
here to come to him, for years hence, he may  
the conveyance then if he has any - if he has none  
at all. But when he says I want to sell all  
of land I shall have at any time, this is a legal  
solution. - The rule gives it, for cannot con-  
vey in present, what he has not - but he may  
obligate himself to convey in future what

What in future he shall acquire  
there a covenant by est. to purchase when & among  
which is binding. If we want to B. the

(B) may have all the lands not become to him at  
the end of five years. - For this is not a transfer in  
present but in future - And you will ob-  
serve that in all these cases, when I could not say  
there is always a new act to be done to  
carry it into effect. - (Maxim, 79. Pow 155-9.) and  
when no future act is to be done the rule is reversed.

An instrument therefore couched  
in strict & c. terms, will not pass a future  
interest, if their legal effect is that of a coven.  
to purchase. - Thus if it covenants or agrees to stand  
seized to the use of B. of all the lands he shall  
afterwards purchase. The coven. is not good  
notwithstanding the word "covenants or agrees"  
for a coven. to stand seized is a coven. of present  
and operates as a present convey. - And future  
act is required to give efficacy to it. 2 Bl. 148. Ha.  
M. 28. Pow 234. 160.

But, the a coven. ex. cannot  
as such transfer a future interest, still  
by est. it will have that operation. This  
rule also affords the rule above that a future in-  
terest cannot be bought, but it only is a rule of  
evidence to prove the intent of the parties to give  
the fact in evidence. Thus in Mortgage Prop. to  
B. who he did not own, & makes a warranty of  
seisin. If he afterwards purchases & improves



July<sup>th</sup> of 1800<sup>th</sup> } property, he is estopped from saying  
 he has no interest at the time of making  
 the mortgage. And also as his Rep<sup>r</sup>. so that Mary<sup>th</sup>  
 holds as if she had, had an  
 indefeasible title at the time of 1800. Pow  
 Mortg<sup>th</sup> 495. 6. 7. 2 Vern 11. 1. 5 R 760.

The rule is the same as to leases, and  
 here to you the land I purchase 10 days time  
 of London into a warranty of sisin I shall be  
 estopped to plead the want of interest at the time  
 of making the lease. Sal 275. Pow. M. 445. 6. 2 May  
 727. 10. 15. 1550. 3 D R 270

And the rule appears to be the same as to  
 an absolute freehold conveyed by deed with the  
 usual warranty of sisin, 3 D R 295. Lit see 440.  
 1 Inst 286. 3 D R 270. 1 Pow 160. 1 Root 222.

But if one  
 makes a conveyance in presence of prop<sup>r</sup> in wh<sup>ch</sup>  
 he has no interest at the time, & without  
 such covenant, it is void - there is no estoppel  
 the gen<sup>l</sup>. rule of law takes effect, & the party may  
 aver the want of prop<sup>r</sup>. interest at the time  
 in avoc. of the last rule. sup.

### The Requisites of a Contract.

1<sup>st</sup> It must  
 be possible, i.e. of performance. 2<sup>d</sup> It must  
 be lawful. 3<sup>d</sup> It must be certain. all that  
 is meant by the last is, that it must be per-  
 fectly understood. These requisites on every

necessity to render the contract binding.

It is a max. of com<sup>on</sup> sense as well as of law that no right can be acquired or oblig<sup>n</sup> created for that which is impossible. such contracts are considered as mere idle words. indeed I think the contract might be set aside on the ground of intention. as if a man went to travel with the retort of the rays of light - or to make a heap of lands covered with the ocean; or to suffer a man to ride a certain act when there is no such act supposed? - In these cases the law will not give damages. 1 Inst 206. Perk. 785.

But in the application of this rule the law distinguishes between acts which are in themselves impossible in the nature of things & those which are not so, but which are impracticable to be performed by the party contracting - the former are void - the latter not. Thus of the latter kind a poor man contracts to pay a sum of one million pounds in a given time. He ~~is~~ would be willing to pay it. it belongs to him. - Now he could sell it unless he can first buy it. This is not impossible to be done, but he cannot make the purchase - the performance of the contract is impracticable - the A. will be liable in damages. And in this case he will not enforce a specific agreement to oblige a decree to that effect and interfere with the rights of a third person 2 L Ray 1105.



Requisites?

There is a kind of court.  
it has sometimes been made by <sup>the</sup> design.  
have taken advantage of the ignorance by their  
superior knowledge of the arithmetical power  
as in case of a contract made by us (I suppose) allu-  
gate to pay the number of wheat ears, which is  
derived by the geometrical proposition from one  
factor the series of the n<sup>o</sup>. of weeks in a year. Or  
as a reward for showing the a horse he was to show  
me the series to 32 thousands of nails in the four  
shoes; These are very much multiplied the Ct.  
the act of pay<sup>g</sup> a large sum of money does  
not come within the things which are impossible  
the within them are impracticable; the  
Ct. decided promisor ought to pay "something"  
if the promisee as he had received a reward. —  
And they directed the jury to give <sup>plf</sup> the value  
of the horse — which in fact was setting aside  
the contract for it is a rule of law in superior  
courts; That the value of the article at the time  
they were to have been delivered is the rule of  
damages. — Was they did not give this amt. of dam-  
ages we infer that they considered the contract  
avoided. The contract I think might have been  
voided without all this diff. on the ground  
of fraud. for it was a plain fraud in point  
of fact — the rule of law — for the calculation  
is a question of fact — After the contract being thus set  
aside, then the <sup>plf</sup> said he entitled to "something"  
as said by Ct. — he having performed the services for

for which the contract was made. 2 Ray 1164. 1 Kent  
269. 1 Lev 111. 1 Wils 295. 1 Keil 559. As to quantum of  
damages see 2 Burr 1018. 1 Bull 424. 1 Pow 408. 3 Stra.

<sup>if the action is  
in re or for a  
sum of money  
of which the  
value is fixed</sup>  
If the action is in re or for a sum of money of which the value is fixed, the contract is not void on the ground of impossibility unless they are actually impossible in the case alone.

The distinction between a contract for a certain performance and a contract for a certain result is not made, as to executory contracts, thus if A agrees with B that if he cut his all his sheep - where very numerous he shall have all his lands - the contract is good, notwithstanding the impossibility is as remote as - so the question appears to be whether the performance is possible or not & not whether it is probable or not. it, and.

And if one contracts expressly & also implicitly to do a thing not in itself impossible but which is rendered so by the party by inevitable accident - it does not discharge him. in the case of this kind come to see 2 Ld Mansfield. Ct. a Merchant in London contracted with B a ship master that he should at Wingham (S. Cor.) at a given time receive a freight. The time was allowed before he had sailed, so that the voyage might have been performed within it. B sailed in proper time but had winds so adverse to the performance of the contract, the Ct held - & I think correctly - that B was liable; the capt. in this case was considered actually as an Insurer, & that may



Requisites of a valid act or contract, as the law  
of Nov 1839. 18 M 366. Long 269.

But if the contract had been made at L.L. and  
time absolutely impossible as in those or even  
in the days of Agreement, the Contract and have been  
discharged. -

2<sup>d</sup> Agreement or contract of the valuer must  
have a lawful object. - for clearly no one can be bound  
in law to do an act which the law itself prohibits  
or to omit an act the performance of which the law  
enjoins - such a contract of Law is void, in the  
strict sense of the word, & not merely invalid, so that  
it can be avoided. -

A Contract may be unlawful. 1<sup>st</sup> when  
the act to be done is in itself, malum in se  
as adultery, when malum prohibitum, as contracts which  
are void as against Law. 1 Nov 1839. 18 M 369.

Of the first kind are all contracts which have for their  
object some act which is prohibited by the Law of  
Moral L. or of Divine as murder, theft, robbery,  
burglary, & indeed any fraud or violence whatever.  
It is immaterial whether the contract be in  
writing, or by parol. 1 Nov 1839. 18 M 373. Case 39.

Of the second kind are all contracts which have for their  
object some act prohibited by the Law of the  
Land, or as usually called of Moral L. This may be  
the Law of Divine L. or Sec. And contracts may be of  
the third kind in either of the particular cases  
1<sup>st</sup> When against public policy of course the policy  
of the Law. 2<sup>d</sup> When against the incumbent -

or customary law. & 3<sup>d</sup> When ag<sup>t</sup> some positive statute regulation. 1 Bow 106. Bow 39. 1 Wll 224. 2 Wll 341. 3 BR 17. 22-3. 7il 545. 8il 89. 1 B&P 272.

In the first place then all contracts wh<sup>ch</sup> impose a general restriction upon ones trading are void as ag<sup>t</sup> the pub. welfare & of course ag<sup>t</sup> Law. & as a genl. proposition all contracts wh<sup>ch</sup> militate ag<sup>t</sup> national policy are void. ex. gr. a contract ag<sup>t</sup> a man shall not receive a partic<sup>l</sup> mechanic trade or a stipulation th<sup>at</sup> he shall not pursue a useful study - tho' I know of no decision wh<sup>ch</sup> goes as far as th<sup>is</sup> last case. Allen 6. 1 Wll 322. 7 BR 543. 8il 89. Bow 39. Hob 211.

The rule is the same as to a restriction upon the exercise of his trade even for a limited time - as for a year - for then the law will not distinguish between a long & a short time, for if a restriction be laid for a year it might as well be laid for the mans life Bow 39. 7 BR 543. 1 Inst 206. 1 B&P 141. 1 Bow 107.

So also if an husbandman sh<sup>ould</sup> enter into a covenant not to cultivate his land either for a long or a short period 11 Co 59b. 1 B&P 107.

But an agreement not to specialise a partic<sup>l</sup> trade at a partic<sup>l</sup> place may be good. - for it may tend to prevent inconvenience & the cruel competition, & also to promote a proper & useful distribution of tradesmen throughout a county. See Gas.



*Regina v. Taylor* 10 Jor. 546. 2 Bulst 135. Palm 172.

But a court of the latter kind  
is not kind enough it is upon ~~supposed~~ <sup>supposed</sup> ~~advice~~  
~~mate~~ <sup>mate</sup> would it. On this point the onus prob.  
lies on the party attacking it to enforce the court.  
for in com<sup>mon</sup> presumption they are not useful.  
The law views them with jealousy as the court  
is not presumed as an case of bond *Stro 999*  
Palm 172. 1 P.W. 181. 192. 10 Mod 99. 85. 130.

And it appears to be immaterial  
whether the trade wh. the man engage not  
to pursue, is his own by profession or not,  
even if it is not, the validity of the court<sup>ts</sup> dep.  
ends upon the distinctions above. 1 P.W. 192.  
How 104. The spirit of the rule is, that no  
man ought to preclude himself from ex-  
ercising any useful trade whatever. & impos-  
sibility, raises not it. Presump<sup>tion</sup> in law  
he will not exercise it.

Upon the same prin, an agreement  
about future trade is called "unlawful main-  
tenance" is void as ag<sup>st</sup> law, because it is  
opposed to the public tranquillity & therefore, it  
being, to support others in lawsuits. - It is a  
species of larceny. wh. is punished rather as  
an offence 2 Inst 212. 4 Pl. 125.

In general a court with the en-  
dorsing enemy is void upon the same prin.  
for mercantile or other communications may  
endanger the pub. safety. Hence it is

is that the subjects of Nations at war with each  
cannot make binding contracts with each other  
25th 647. 1. P. 35. 6th 648.

And on of same. In a policy of  
Insurance upon the profit of an alien enemy  
is void, the in point of for it was not made  
with directly with him. — for such Insurance  
promotes the commerce of the enemy, & gives our  
citizen an interest in its safety. But this rule  
has been questioned on the ground of the inter-  
est of our citizen being more promoted by waging  
the enemy; — but this point I do not pretend  
to settle. The rule however is fixed 6 P. 35 —  
with 646. 1. P. 35. 1. East 46. 475. Doug 238. —

But, the rule of all contracts made  
with an alien enemy are void — is not civil  
moral. It is settled, at least by the usage &  
custom of most civilized nations, that Ransom  
Bills, or contracts, are obligatory.

By a Ransom bill is meant one by which the party  
captured on condition of being released, agrees  
to pay his captor a certain sum as a ransom  
And a master of a private ship may by such  
contract bind his owners as well as himself. 1 Burr  
1735. 1 Ch. R. 513. Doug 674.

The immediate jurisdiction of these  
contracts vests in the Lib of Admir. & not in those  
of C. L. the in then latter the question may incid-  
entally arise. Marshall. Ch. 432.

A ransom bill has been refused when



The practice, Law } the practice used - it is a  
common practice for the captives to surrender  
one of the crew to the captors as a pawn or  
pledge. And it was once decided that the  
Cham. still was good, in that the captives themselves  
were often and taken. This was decided in the  
B.L.C.C. v. Manaf - before the judgment of the  
Ct of App<sup>ts</sup> were established it was.

And indeed all courts with an alien enemy  
who arise out of a state of hostility & tend to miti-  
gate the evils of War are bind<sup>d</sup>. It is upon the  
basis that Nations make treaties, truces, agreements for  
the exchange of prisoners &c. with each other during  
625-6.

But ransoms are now prohibited by L. 22 Geo 3<sup>d</sup>. As  
well in the Ctg of App<sup>ts</sup> now is. That an English-  
man may now receive a ransom bill; but he  
cannot give one.

A similar bill was introduced into Eng<sup>l</sup> not  
long since & passed sent.

In the same spirit Marriage  
Agreements (as they are called) are void. They  
are given as a reward or premium for a pretence  
or influence to be rendered by a third person  
to procure a marriage. They are considered as  
being greatly detrimental to the public welfare  
as by endangering domestic tranquillity; by in-  
ducing the exertion of undue influence & decep-  
tion, in this most important of courts, Doubl.  
245. 1 Burr 474-5. 3 Ld 441. Ex p D 184. 1 Bos 14. 190.

where not only bonds of this description but agree-  
ments entered into in any form, for this class  
are also void. in auc.

3<sup>d</sup> Contracts may be unlaw-  
ful as opposed to some max<sup>m</sup> or prin of the  
Municipal Law.

It is a general rule that any contract  
which is opposed to any max. or prin. of the Law  
& particularly of the U. S. is void, hence if any  
consideration which is the cause of the prom.  
or even the prom. itself is opposed to any such  
max. the contract is void. 1 Bulst 156. 3 Dal 97. Thus  
if a prom. made to a merchant clerk or agent  
in consid<sup>n</sup> of his fraudulently discharging  
a debt due his principal is void. Here the  
prom. is not illegal, but the consid<sup>n</sup> is a  
fraud agt a third person. & therefore oppo-  
sitive to the prin. of U. S. Law 176. 3 Dal 97.

And even in illustration of an illegal prom.  
If a ship promises for a valuable consid<sup>n</sup> to  
permit an escape - it is void. Here the consid<sup>n</sup>  
is in itself lawful, but the undertaking  
founded upon it is in its nature unlawful  
to be done.

There is also some of a bond was given  
to a ship to indemnify him for any escape  
- here the illegality lies in the consid<sup>n</sup>. 1080.  
46 & 104. Cas C. 199. Lj 356.

Upon the same prin. a  
promise by an Minister of justice to do an



Deposits lawful an act illegal and officially wrong.  
A bond of indemnity given him for such an  
act is also void. For the prom. is the fact on  
it is consid<sup>n</sup> in y<sup>e</sup> case? is illegal Case 228. 1 Bow  
176.

But still when the illegality of the consid<sup>n</sup>  
is rather the fact which makes the consid<sup>n</sup> illegal  
is <sup>unknown</sup> to the promisee the bond of  
indemnity will be binding. Thus if a thief  
in making an unlawful arrest, requires a  
person who is ignorant of its illegality, to ob-  
lige him, & promise indemnity, & a promise  
the prom. will be good. If the promisee who  
be subjected in an act of false imprisonment  
on one, he is answerable over against the thief. But if he  
knows the arrest to be unlawful he need be partici-  
pate criminis.

So a g<sup>d</sup> if the thief in an act of violence, & the  
thief to take the goods, not actually belong to  
the thief, not knowing who are the owner  
states them, a prom. of indemnity by thief  
and be bind<sup>d</sup> in favour of thief. & such in  
getting rid of the effect of all prom. of g<sup>d</sup> bind  
for the thief if he refused to take the goods and  
be liable to the g<sup>d</sup>.

App. If a man, a man & a man, as I say  
on my land, he not knowing the contrary, shall  
be liable, with or without giving him an & the  
promise of indemnity Case 228. 1 Bow 176.

Wagon

Upon the same great prin. of being op-  
posed to a max of the Law, all courts aft<sup>r</sup> are  
inhibited ag<sup>t</sup> the Law of morality & decency, or  
void. Thus in case of a wager upon the res of  
Charles P. Con. it was void - not however in  
consequence of its being a wagering contr<sup>l</sup> but be-  
cause evidence of the fact and lead to inducement dis-  
closure. Law 39. 729. 735. 2 S. 610. 3d 693.

and all courts  
made for any corrupt purpose, as to effect  
bribery, whether they are in form or not, are  
void. as of a candidate at an election who betw<sup>th</sup>  
another ag<sup>t</sup> his own election, So also a wager of  
a man who has an influence in the appoint-  
ment in favour of a candidate. As with a judge  
if suit will be decided as it is or by the opposite  
counsel, for all these operate as an inducement  
to the act. See 40. Con 39. 1 P. 182. 184.

So also a wager wh<sup>ch</sup> is made a color for  
ag<sup>t</sup> the contrary to the character of usurious  
immediately on the appearance of the truth. 1.  
P. 184.

It has also been decided that a wager as to the  
mode of playing an illegal game is void, and  
tend to promote the playing of that game  
2 P. 43.

A Wager between the litigant parties in a  
law suit is good by the L. D. for here it cannot  
have the operation of bribery, for they are supposed  
to have already a sufficient interest in the suit.



Requisites. Lawful. Cor 37. 1 Nov 145.

is a Gent Rule  
wagering contracts by the C. L. & the Law of many of  
the U. S. are binding. but the policy of the  
Law has been questioned <sup>in Eng</sup> by many very wise  
men, & I believe by most all of the  
present reign, on the ground that they are mis-  
chievous to individuals & of course to the country.  
but it was the complain of as being too  
stubborn for them 1 Nov 145.

But in Cor. all wagers are declared illegal  
by St. But by some decisions when adopted  
before the making of this it is to be inferred that  
the same rule wd have been established as part  
of the C. L. of the State. And the St further declar-  
es that money knowingly lent at the time  
& place of gaming to one of the parties con-  
cerned shall not be recovered back, St Cor. 36.

All contracts  
made to defraud third persons are illegal & void  
- this rule is universal - for it is indeed by the St.  
then are regarded as the most corrupt &  
voidable - & it is totally immaterial whether  
it is the public or an individual that is  
defrauded - the rule is the same See 33, 455.  
2 Cor 155. 176. 156. 4 R 106. 216 703. 4 R 322. 830.  
2 R 763. 10 R 95. 286. And then on contracts  
not made to be satisfied, indeed they cannot be  
enforced or made a cause of a subsequent  
contract. a. p. m.

In this last prin. a secret agreement  
by one of the parties to a marriage to refund  
a part of his portion to the party providing it  
is void as being fraudulent agt. the other party  
to the marriage & her friends. also a son agrees  
to return a part of his portion to his father  
after the marriage is complete. - this is fraud.  
unless agt. the wife & her friends - Sta 240.  
Cap 2 184.

An agreement to pay over for attend<sup>ance</sup> an  
auction for the purpose of ~~stealing~~ i.e. to swindle  
and the price - is void as being fraudulent  
agt. the bidder. - this is a state trick and is  
unen. ad prin. at 1 Pow 186. -

Contracts prohibited by the  
Law, are also void, as an agreement to pay more than  
the rate of interest allowed by stat. 1 Pow 186.  
186. 1 S.R. 736.

It also a secret agreement by a bankrupt to a  
his agent, to pay a bribe for signing his certifi-  
cate is void, as agt. the Cr. - but I take it this agree-  
ment is not illegal at Cr. - for if the Cr. thought  
the debtor worthy of the certificate he ought to give  
him - & without reward - & if he thought him unwor-  
thy - the reward and operate as a bribe, &  
in either case the receiving the reward would be  
fraudulent agt. the other cred<sup>itors</sup> as it would be taken  
from the average which belongs to them. In con. it  
has been so decided Doug 576. or 596. 1 Pow 196.

There is very little occasion for partition since



Cont<sup>ts</sup> void } cont<sup>ts</sup> rendered void by St. because  
when a St renders illegal a class of cont<sup>ts</sup>, we  
nothing to do but to ascertain whether the one  
in question comes within that class.

as to the  
illegality of cont<sup>ts</sup> in gen<sup>l</sup>. Cont<sup>ts</sup> are in gen<sup>l</sup>  
illegal & void wh stipulate for the omission  
of any legal duty. - as the stipulation of a dep<sup>y</sup>  
sh<sup>d</sup> not know the purposes of a particular kind  
Robt. 12. Moore 835.

The rule is the same as to cont<sup>ts</sup>  
wh tend to encourage unlawful acts & omis-  
sions, & this tho the agreement does not expressly  
stipulate for such acts or omissions - as a  
bond given to a printer to indemnify him  
ag<sup>t</sup> all injury wh sh<sup>d</sup> arise to him from  
the publication of a libel - here is no  
stipulation for it - but the bond tends to  
encourage it - So a bond to indemnify  
a sh<sup>d</sup> ag<sup>t</sup> an escape, a for of unlawfulness of a  
Whit. - This rule is of very extensive ap-  
plication & may be said to run upon the same  
ground, that any cont<sup>ts</sup> to save <sup>one</sup> harmless, for  
committing any wrong whatever is void as ag<sup>t</sup>  
law - for it tends to encourage offences. Dow 14.  
1 Lev 209, 10 Co 1006. Cro. E. 353, 4.

There also a wager between two persons  
that one of them or a 3<sup>d</sup> person will do some  
illegal or crim<sup>l</sup> act is void. - as to commit  
a battery it are.

And the same rule extends to all contracts which operate as an exclusion to the commission of immorality - even the that kind of immorality be not forbidden by positive law.

There is a distinction taken in the books between contracts void & given for the performance of some act made illegal by L. & those for & performance of some act illegal at L.

as to the former, if the contract contains several covenants some of which are void by L. & the others good. - the whole contract is void - & not merely the parts which are unlawful. 2. Wils. 351. 1 Vent. 229. 1 Dougl. 159.

But as to the latter, if some of the covenants are unlawful at L. & the others good. the contract is void as to the illegal covenants only & good as to the others. Thus if an under sheriff covenants not to serve parties in process, & also in the same instrument to save the sheriff harmless as to any escape of persons arrested by himself (deft). the first covenant is void but the second is good.

But on the other hand if the sheriff had taken a bond of the deft. (see 5. of case of Parsons) & also for a bona fide debt due himself, the <sup>contract</sup> would have been void in toto. & he would never recover upon the debt than so far as the contract is void. 2. Wils. 351. 1 Vent. 229. 4 Sa. 428-9. 1 Dougl. 159.

I have never seen in any book a reason assigned for either of these distinctions - it has



Alleg. Exh. 1st. } has been considered as something  
mistaken & perfectly arbitrary. Justice Wil-  
son observes that the St is a general title  
announcing a general duty & is not a defining a  
season. The distinction does not arise from  
any supposed diff. of form as to effect a  
partial illegality created by St in the one case  
& by the Act in the other. But I suppose the  
true reason arises from the established phre-  
nology & construction of St Law. For it always  
declares "the bond," "the security," "the note &c."  
void & the expression is construed to extend  
to the whole bond. & this reason is satisfactory.

But tho' accord<sup>d</sup> to the rules above said & own  
an illegal contract creates no right wh can be  
enforced, still when used? the law in many  
instances suffers it to take effect by refusing  
it aid to either party. This is when both  
parties are consid<sup>d</sup> as crim<sup>s</sup>. And so he who has  
paid money in exch<sup>d</sup> a contract cannot recover  
it back ag<sup>n</sup>. The law leaves the parties as it  
finds them, & is perfectly neutral upon the  
m<sup>x</sup>. in fair delictu melior est conditio  
deperi. Decreted Doug 451. 104 108. BND 131-2. Lat 22. &  
574. 1 MPP. 298 Cow 790. 2 Burr 1012. & q<sup>r</sup>. Stentor  
into an exch<sup>d</sup> ag<sup>n</sup> to convey a tract of land  
so B & W if he will commit a larceny. Does it  
he recover of A by any principle of law. And  
if A like an honest man had made a convey<sup>ce</sup> to

he cannot recover it back again.

But while the court remains here, on one side, it is said the party who has paid who has paid money up on it may recover it back again. Thus, if I pay B. a sum of money, & B. undertakes to commit a battery, now before the battery is committed, i.e. may recover back his money, <sup>in indebit. ass.</sup> but not after it is committed. The rule is well established, but it appears to me to be a palpable departure from principle founded on a misapplication of principle. I think the rule should be <sup>inserted</sup> ~~repealed~~ <sup>inserted</sup> before or after the court is seated, and no case at all, in the spirit and answer the real intention of the law. But as the law now is, it operates as an inducement to the offence, whereas by the contrary rule this inducement would be taken away. & thus you pervade to the intention of the law in all the cases of illegal contracts. 8 D.R. 575. Doug 696. 1 B. & P. 298.

On the same principle it has been decided that money deposited upon an illegal wager, & paid over ~~with~~ <sup>with</sup> consent of the boxer after the wager was decided cannot be recovered back. But if it has not been paid over can I may recover of the stakeholder the sum he deposited, for & James v. ~~see~~ 8 D.R. 575. Doug 696. 1 B. & P. 298. & 5 D.R. 403. 3 East 322. This latter rule has been overruled in ~~York~~ 4 Johns 415.



Illegal Wagering

And in all cases in which money has been deposited upon an illegal wager it can be recovered back, by the party depositing it before the wager is determined. 8 M. 192. 1 How 202. 206. 207.

There are some cases arising out of illegal wagers w<sup>ch</sup> I do not consider as fully settled. Thus money being deposited with a stakeholder upon an illegal wager, is paid over by him to the winner, after being forbidden so to do by the t<sup>ax</sup>es. Quest. can the money be recovered of the stakeholder? I think so on pain; but not on aue. The winner cannot on pain recover of stakeholder after the prohibition, & the law will not allow the stakeholder to cheat either party. There are some aue to support my opinion, but the weight of aue bears upon the contra. 2 Ray 89. 5 BR 409. 10 BR 297. 1 MSK 64. 2 PR 1075. 2 Wils 309. contra 3 East 222. Esp. D. W. 25. & the broad ground here taken is that the loser cannot recover of the stakeholder, & much less shall the winner, after the wager is decided. an aue to this decision is in 5 BR 405, cannot be law, which determines of each party may recover his own before it is paid over.

It has also been determined that money paid before hand by one of the parties, on an illegal wager, was recoverable back after the wager was determined, altho' the event was in favour of debt. But this rule has been

been granted? & perhaps virtually denied, as I see  
4 D.R. 535. & quest. 1 East 96. & 8 D.R. 575. & directly opposed  
4 Johns 426. I think however the rule goes upon a  
true principle for it will bring about the right  
results, by destroying the inducement to then illegal  
negotiations & contracts.

say? it has been determined in pursuance of  
the first genl. distinction above, that money paid  
for the procuring of an office may be recovered back  
before the office is procured, but not afterwards.

and no money paid as a premium upon  
an illegal insurance may be recovered back  
by the Insr? before the risk is run, but not after-  
wards Doug 471. 1 Pow 202. 205-7.

Thus far I have been  
speaking of illegal contracts in which both parties  
were deemed equally criminal.

But when the party who  
has advanced money upon the illegal contract,  
is not deemed *particeps criminis*, he may  
recover his money back even tho' the contract be  
annulled by the other party. This rule applies  
in all cases, in which the law prohibits the  
contract, for the protection of one of the parties  
against the other. As in cases of usury, the borrower  
may there recover back the unlawful interest  
if he has paid it - for he is not considered as criminal  
in paying it, tho' the lender is in receiving it - and  
indeed the law being made for the protection of the  
borrower against the rapacity of the lender it would be



Illegal contract } to abscond to consider him as party  
crim. - This however was formerly the law. Cow 491.  
Doug 451. 571. Stra 915. 1 Sm 218. 225. 1 Wm 65. old  
max in Cal 22. but this is not now law. -

This rule is the same  
if a bankrupt or one of his friends pay money  
as a cond. for signing his certificate. If being  
induced by it for the protection of a bankrupt  
the money may be recovered in indeb. ass't. ib.  
anc. 1 Pow 205.

This a contr. stipulating for the per-  
formance of an illegal act. - is void, still  
a contr. or prom. to security given in consequence  
of a previous act done ag't law. is not of course  
illegal & void. Hence it has been determin'd.  
that if one of the partners in an illegal trade  
pays the whole loss incurred. a security or  
promise given to him by the other partner  
for the pay of his money, is bind. - But the  
determination has been questioned, tho' I  
believe not properly denied. 4 Bur 20 59. 3  
ER 415. 2 Wm 379. Wats. Part. 180. - see quest. 5 ER.  
61. 405. 2 B & P 372. 7 ER 638.

It has also been determin'd. if if a whole loss has  
been paid by one partner with the joining  
& consent of the other, he must give every  
prop. prom. to pay. - The law will raise an  
implied promise - This has been the subject  
of still more animadversion than the former  
rule. 2 Wm 379. 5 ER 61. 405. 7 id 580. 2 B & P  
372. 3. 209. 1<sup>st</sup>

If one of the partners pays the whole exp<sup>ts</sup> without the privity or consent of the other the latter is not bound to contribute for them there is no express promise & none implied by law - 2 HBL 379.

If a person enters into a contract & making of it by him is made unlawful by positive law he is bound by the contract tho' he cannot claim under it. Thus the 21<sup>st</sup> Hen 8<sup>th</sup> makes it unlawful for a clergyman to trade, & under 8<sup>th</sup> Ed it has been decided as above. The clergyman is the only person affected & there is nothing unlawful in the things stipulated to be done - if he would hold bail & was suff<sup>d</sup> to enforce the contract it would grant him a privilege rather than afford a premium 1<sup>st</sup> ed 146-9. Chit B. 17.

So also a person, who trades only as a smuggler, is liable as a trader within the bankrupt laws, & subject to his commission still he can not avail himself of the contract he makes in this business 1<sup>st</sup> ed 149.

If the object of the contract is perfectly useful or necessary the contract is void, as that a man shd not wash his hands, but this maxim or contract his bail for a given time - the law will not interfere in such contract it will not suffer itself to be trifled with

A contract manifestly affecting the



Illegal Contracts } the interest or peace of third  
persons are void. As a wager or contract which  
has for its object the ~~the~~ <sup>the</sup> interest of some other  
person in a third person - indeed such contract  
are always not only ~~unlawful~~ but malicious.  
As to ~~whether~~ <sup>whether</sup> a person has any back teeth,  
or wears false teeth or hair. Cow 724. 735. 3 BR 699.

The third Requisite to a contract is  
that it be certain. That is it must admit  
of some clear intelligible construction. If A.  
shd agree to deliver goods to B. on arrival of  
D. & pay him a sum of money in a short  
time, the contract wd not be binding - for the  
time of pay<sup>t</sup> is indefinite - the law must  
define a short time - indeed, time is short  
only from comparison. 1 Rol 924. Cas 9250.

But a prom<sup>t</sup> to pay  
a certain sum of money - no partic<sup>r</sup> time of  
pay<sup>t</sup> being fixed is good - for the promise  
by construction of law creates a present debt.  
3 BR 124. 424.

If one however promises to do a collateral  
act as contract is distinguished from pay<sup>t</sup>  
of money - It is said he is allowed his whole  
life time to perform it in - So he can be liable  
to no ac<sup>n</sup> for breach of contract - but if he does  
not perform it, his rep<sup>n</sup> will be liable to this  
ac<sup>n</sup> - i.e. a promise to make a lease to B.  
1 Shaw 180.

Envolutions to this subject of certainty  
in contract it is a max. in certum est, quod cer-  
tum reddi potest. That is, what can be made  
certain from any definite standard or meas-  
ure is considered as suff<sup>y</sup> certain in law.  
As, a contract to deliver in a month, \$1000. worth  
of wheat. Here no particular quantity is  
specified, but the market price will determi-  
ne it. & so a prom. to give as much for an  
article as B. shall say it is worth. Polk 146.  
Cro & 194, 7 Sid 270. 1 Kent 50. 63.

### Of the Nature & of the Effects of Contracts.

all contracts  
are either ex ec. or ex ec.. A contract is said to be ex ec.  
when the parties transfer prop. to each other with  
immediate prop<sup>n</sup> or with a present indefeas-  
ible right of future prop<sup>n</sup> so that neither party  
thinks at all to the other, than as if goods sold,  
paid for & delivered. The prop. then is delivered & so is  
the money, as is the contract ex ec.. Or if a having  
lands under a lease for a term of years. grants  
the reversion of it to B. - here the contract is ex ec. not  
indeed accompanied with delivery of immediate  
prop<sup>n</sup> - for a prop<sup>n</sup> vests in B. as soon as the lease  
is determined, but it is a transfer of an inde-  
feasible right of future prop<sup>n</sup>. 2 Chl 446. 1 Dow  
158-9. 175. 234.

Executory Contracts are those by which one prop.  
passes in present, but which are introductory, or



Contract is a binding of or preparatory to an actual future transfer or exchange of property, etc. an agreement between A & B to exchange horses next week, it acq. a court then in the words of Powell & W. is either when one performs immediately & the other is trustee, or when neither performs immediately & each is trustee, - but this language I think is not quite correct, and is more so to say it in former case the court was used on one side & used on the other, & in the latter use on both sides. Thus A lends money to B on a prom. to repay. the agree. is used on 1 part of 1 lender, & is used on 1 part of borrower B. and 2. a court to make a loan or consideration of payt in future is a court used on both sides. Pow 294

As to the effect of this distinction see post. pa

All courts.

agts are either express or implied - this is merely another coordinate distinction. Powell says, & I think is correctly, that courts are either express, constructive or implication but there is no propriety in making this middle distinction - as I will satisfactorily show post. pa

A express court is one in wh the parties stipulate in exp terms what is to be done or omitted. - this definition needs no illustration. Pow 236.

Constructive courts as Powell terms them

There are such as are raised by construction  
out of the instrument or express agreement.  
I am diff't from what the instrument or express  
agreement *prima facie* imports. - This distinction  
is altogether arbitrary. There is no real  
thing as a logical or legal distinction be-  
tween express & constructive words. - For the  
latter is raised out of the terms or words made  
use of in the former. As. a reital is a deed  
of convey. respecting the estate of grantor  
in the subject conveyed amounts in construc-  
tion of Law to a covenant on his part  
that he has a title in the subject - as a cov-  
enant of seizin, - it is express, & it is immu-  
terial whether it be expressed in the terms of  
a writ or by recital: whether he says "I  
covenant y<sup>t</sup> I am well seized &c" or "whereas I  
am well seized &c" For if the agreement be found-  
ed in the language of the parties - the agreement  
is express. Cro. J. 37. 665. 1 Lev. 24. Ray 14. 1 Leon 122.

So also a reital in a mortgage ~~reital~~ of  
"whereas it is to pay £1000 a portion" it is held  
to be a covenant, a agreement of y<sup>t</sup> to pay £1000.  
After an express covenant w<sup>th</sup> Powell calls con-  
struction 1 Pow 236. 2 Eq. Ca 652.

There are many cases in w<sup>ch</sup> a  
clause of exception in a deed indented am<sup>t</sup>  
to a certain construction of Law. Under this  
head there are many distinctions, but for this  
I must refer you to the title of Execut<sup>r</sup> Testam<sup>t</sup>.  
One sample I will give you. In a Lease by Ind<sup>t</sup>



Part of the indent of { indenture of a farm of land on  
exception is made of a particular close, this  
exception amounts to a covenant by the lessor  
and close shall not pass by the lease. see  
Case E 637. Plow 87. 11 Co 50b. 1 Leon 117.

Is also a reservation of rent in  
a lease indenture amount to a covenant on the part  
of Lessee to pay rent. this is one of Powell's  
construction comes to lessor as a lease and  
Case E 657. Lth 407. 1 Vent 10. Case E 399. Poph 100  
137. Rol 518.

Is also a lease without impeachment  
of waste amounts to a transfer of the fees  
on the land to Lessee. for as he is not liable  
for cutting them it is presumed they are  
granted to him. Mol 192.

Implied Covenants on the  
other hand are such as are neither raised  
or implied in terms; nor raised by construction  
of the terms read in an express word.  
but are raised by the operation of law from  
the facts or nature of the case or as is usu-  
ally said but of the transaction or no part  
of the case. Thus if A at the request of B.  
labours for him, without a grant as know-  
ing. the law raises a promise to pay of the  
nature of his labour. - this promise arises  
from the facts by construction of law out of  
operation of the transactions

So if goods are delivered to C. for safe keeping -

on other cause, the law raises the implied  
promise in it to use all proper care of  
them - 1 Dow 245-6.

Express & implied con. to entrust the money

If a ~~shop~~ raises money on an ~~acc<sup>t</sup>~~ the  
law raises a promise on his part to pay  
it over to the ~~shop~~ in the ~~acc<sup>t</sup>~~ - it is so -

and indeed without particularizing  
cases. Sabers that the numerous class  
of acc<sup>t</sup>s called acc<sup>t</sup>s of Indebitatus ~~are~~ <sup>are</sup> ~~are~~  
are universally founded on such implied  
promises as arise out of the nature of the  
transaction, see tit. Indeb. acc<sup>t</sup>.

If A. grants the trees growing on his  
land to B. he impliedly grants him a right  
of ingress & egress to take them off. Here the  
grant is totally implied from the fact of  
of the grant of the trees & not from the terms  
of the grant. 1 Dow 15. 1 Saund 322. 2 Bl 36.

and now since tenancy at will  
has been converted into tenancy from year  
to year, it has been determined that if a  
tenant holds over without opposition from the  
landlord an implied agreement is raised in the law  
that the tenant shall remain at tenancy for year  
to year, & this implied agreement will continue  
until expressly terminated by the landlord by giving  
notice to quit. 1 Dow 135. 258.

The variety of implied consequences great  
the law has alone I believe is sufficient to give you



that 4 kinds of contract & give a clear idea of them  
we then classify under the 4th of contracts.

All contracts are  
either absolute or conditional. The term absolute  
is here used in contradistinction to conditional -  
An absolute contract then is one  
in which the party binds himself, or herself  
absolutely & unconditionally. Thus, it is  
considered of a case from B. contract to pay  
money - then the promise depends upon  
no condition & 2 Bl 152. 1 Bos 259.

A conditional contract is one the  
obligation of which depends altogether or  
in some respects upon some uncertain  
event, upon which it is to take effect, be  
defeated, enlarged or abridged. - When  
it is to take effect or be defeated upon  
the happening of the event it is altogether  
conditional - when to be enlarged or  
abridged upon the happening of event - it is  
but partially conditional 1 Inst 201. 2 Bl  
201. 2. 1 Bos 259.

Thus, if A agrees  
to purchase a tract of land on condition  
B returns from abroad on such a day, the  
condition suspends the obligation of per-  
formance until that day - when if B  
returns the contract becomes absolute &  
if he does not, it is annulled. And this  
is a good rule & when a contract depends upon a  
contingency, - for the happening, or failure

failure of the contingency the contract is absolute or annulled or it acc.

If a prom. is made to pay £1000 on condition he marries B or sure a day the contract is on precisely the same ground as the former.

An agreement to pay £1000. on condition of a conveyance of land being made to the assignee to the money is in debt until the conveyance is made it acc.

If A. agrees to give B as much for a tract of land as C. says it is worth. the contract is so far conditional, as that A. agrees to pay the money & is suspended until C. ascertains the value. & when this is done the contract becomes absolute, & the money may be recovered at law. But if C. refuses to value the land, the contract is at an end & this contract is altogether conditional. 91b. 1 Pow 281.

Contracts are sometimes partially conditional as ex. contracts to sell goods to B for 10 £ on the happening of a certain event & for £5, if it fails. Here the contract will not be defeated if it is the sum to be paid only which depends upon the condition. Per 22 71b. 1 Pow. 260.

Unlawful conditions, the subject is of course involved in the subject of cond. contracts.  
The effect of unlawful conditions varies according



Condit<sup>o</sup> tentat<sup>o</sup> & accid<sup>o</sup>. to the nature of the  
condit<sup>o</sup> & of "condit<sup>o</sup>" itself.

The first general rule on y<sup>e</sup> subject  
is, If an unlawful condit<sup>o</sup> is annexed to an  
acc<sup>o</sup>. condit<sup>o</sup>. the whole condit<sup>o</sup>. & not the  
condit<sup>o</sup> only is void. Thus a penal bond is  
given conditioned that alligee commit an  
unlawful act. as murder ~~theft~~ theft &c  
- is void - Performance cannot be compelled  
for a right of recovery can never be acquired  
by the commission of a crime 1 Inst 208.  
Esp. D. 175. 182. 185.

And the rule is the same whether  
the unlawful condit<sup>o</sup> be for the performance  
of an unlawful act or the commission of a legal  
duty as if the condit<sup>o</sup> militates ag<sup>t</sup> public  
policy or the good welfare &c. or a penal bond  
conditioned for forbearance of engaging in  
such a trade. The whole condit<sup>o</sup> & not the condit<sup>o</sup>  
only is void, for to enforce y<sup>e</sup> bond there must  
be a forbearance of that wh<sup>ch</sup> the law will  
not allow. 1 Inst 181. 4 Bur 2225.

In such cases the law frees the alligee  
from the penalty which he is to do the  
unlawful act. but he is to be under a  
disqualification to do it. And on the other  
hand deprives the alligee of any benefit he was  
to derive from the crime - wh<sup>ch</sup> he is to do the  
unlawful act. - & then deprives him of a  
similar temptation. So the condit<sup>o</sup> can remove

more be enforced for the omission than for  
the commission. & the object of the rule is  
the same in both cases.

But gent<sup>l</sup>. speaking of an  
unlawful condit is annexed to a convey.  
the cond alone is void & the conveyance body  
of the convey is good. Here you perceive the  
aid of the law is not necess<sup>y</sup> to enforce the  
convey<sup>t</sup> it being already rec<sup>d</sup>. by the parties.  
whereas in case of exec<sup>n</sup> convt recourse must  
always be had to C<sup>t</sup> of justice to compel  
the convey<sup>t</sup>. not so with rec<sup>d</sup>. Thus if one  
make a feoff<sup>t</sup> to be good on condition of feoff<sup>r</sup>  
doing an unlawful act. here if feoff<sup>r</sup>  
does not do the unlawful act, the feoff<sup>t</sup>  
will be good & the estate absolute as if there  
had been no cond annexed. — The cond alone  
is void. 2 Bl 157. 1 Inst 206. The law here secures  
the estate absolutely to the feoff<sup>r</sup> that he shall be  
under no temptations to commit the act, stop-  
ped by the cond.

The question, on this distinction  
between exec<sup>n</sup> & exec<sup>n</sup> convt may here arise. —  
Why it is that the unlawful cond in an exec<sup>n</sup>  
convt renders the whole convt void, when if it  
is in a rec<sup>d</sup> the cond alone is void? It is to be  
observed that the effect of the conditions in  
the two cases are diff<sup>t</sup> & the object to be at-  
tained by the rule is the same. & this diff<sup>t</sup> of  
effect arises out of the diff<sup>t</sup> nature of the



(Bond "Boutin") the court. When a court is seised  
of a cond<sup>n</sup> if it is unlawful, the Ct on application  
tho to enforce it, will not do it; for they will  
not reward the p<sup>r</sup> for his crimes. If the court  
is seised. Both parties are deemed pari delicto  
and no need of application to Ct. to enforce  
it, it being already done by the parties. &  
as the law will not enforce the cond<sup>n</sup> it be-  
ing illegal, nor direct the ~~rec~~ recovery of  
estate already paid? and thus attain the  
common object viz it deprives the person  
of his inducement to commit the offence  
& this is the principle wh governs the two  
cases --

But the latter rule viz as to court's seizure  
containing an unlawful cond<sup>n</sup> - applies only  
to those cases in wh both parties are deemed  
pari delicto - when the p<sup>r</sup> is not partici-  
pating criminal. For in these cases when he is  
not so considered the law is made for his  
protection ag<sup>t</sup> the impositions of the other  
party as in case of a mortgage to secure  
the pay<sup>t</sup> of usury, here the law makes  
both the concept & cond<sup>n</sup> void. & indeed it  
is need<sup>d</sup> to answer the object of the law.  
and this is the rule in all cases in wh  
the party making the court is not deemed  
criminal.

So a bond given a witness, conditioned to be true  
being if he fail to appear at Ct. - seems void -

4 Burr 225. 2 Vent 109. 2 Wils 344.

To a bond given before hand to secure a  
restraint of prostitution is void in toto, for  
it appears as an inducement to immorality  
- but if given afterwards it is binding for  
then it is as a compensation for the injury  
involved in the act 3 Burr 1568. 1 WBL 517.

3 Wils 389. 2 OMS 32.

All cond<sup>n</sup> repugnant to the nat-  
ure of the estate or conveyance is void. Thus, if  
a feoff<sup>r</sup> in fee is made on condition that  
he shall not alien - the estate is absolute  
for the right of alienation is inseparable from  
an estate in fee, so the condition is techni-  
cally repugnant in the first place & to the  
policy of the law in the sec<sup>d</sup>.

Arg<sup>t</sup>. a convey<sup>r</sup> in fee, on cond<sup>n</sup> feoff<sup>r</sup> shall  
not take the rents & profits of the estate. &  
cond<sup>n</sup> is void as repugnant to the very nature of  
such an estate, & of course they cannot exist  
together - but the convey<sup>r</sup> is good. Cas 494. 2 Ann 28.

It is however agreed that a bond  
or covenant of feoff<sup>r</sup> that he will not alien  
or take the profits of his estate may be good.  
for such a bond &c is not inconsistent with  
the estate, & does not on failure of fulfillment  
give his estate to a forfeiture but only subject  
him to damages if a c. 1 Inst 206b.



## Impossible Conditions.

A condition may be impossible at the time of making the contract, or it may be possible at the time of making the contract, and become impossible afterwards. The effect of the impossibility in these two cases is often very different.

I consider the last of these impossibilities first. If the condition then not possible at the making of the contract becomes impossible afterwards by the act of God or law, or of the party, the rule is, that if such condition be essential to a contract, the contract is not satisfied by the non-performance of the condition. 1 Inst 206b. 1 Dow 254-5. 144.440. Thus sup. from a promissory made by A to B. on condition B goes to A. within six months & does some business for him & within that time B dies; this impossibility of performing the condition does not defeat the estate; - but on the contract it becomes absolute on the death of B. on the max. actus div. nemini facit injuriam. 10 Mod 268. 1 Boga. 10935.

To say if the condition is rendered impossible by the act of the party granting the interest or entering into the contract, thus it makes a difference to B to be void if B does not appear on a certain day at a certain place (as M) to do a certain act. Now if A imprisons B. he

he shall not take advantage of the non-fulfilment  
thereof. The ground on which this goes is, that  
the contract being executory, the estate shall not  
be divested by virtue of the contract except by  
some default of the party, who is now the case  
here.

But if the contract becomes impossible by  
the act of the party to whom the grant  
is made it is otherwise - for he cannot  
avail himself of a supervenient im-  
possibility occasioned by himself, as if in the  
last case the contract became impossible by the  
suicide of the party - in such case his heirs  
do not claim the estate 1 Port 2108. 1 Port 420.

To agree. If the  
contract is rendered impossible by the act of law  
thus suppose a person is made an executor  
within a certain voyage within a certain time  
& during the whole of that time such voy-  
ages are prohibited by Act. the estate is not  
divested. & the person is allowed to treat the contract  
as impossible - the failure not being attrib-  
utable to himself 2 Port 215. Sal 198. 3 Port  
269. 5 il 269.

Another sample in which the impossibility was occa-  
sioned by party, making a grant of an estate a  
person to be void if it does not marry & in a  
limited time, & within that time & himself  
marries her. The non-fulfilment by her will not de-  
vise her estate, but she defects her own claim



Impossibility Bond<sup>m</sup>

2<sup>d</sup> But if such

a cond<sup>n</sup> is. one or more possible at the making  
of the contract but becomes impossible  
afterwards by the act of God, or of the Law, the  
contract is an impossibility. The allegor is  
discharged of the whole contract. Tel 170. 1 Foul  
209. 1 BR 658. 7th 384. 2 BR 126. 128.

Rule here as<sup>n</sup> is the same when the  
cond<sup>n</sup> becomes impossible by the act of the party  
in whose favour the contract is made in the allegor  
or covenant. Thus suppose A gives a bond to  
B. A on cond<sup>n</sup> B appears in M. Ct. on such a  
day, & before that day B dies, the whole alleg<sup>n</sup>  
is discharged - & it does not remain a single  
till.

Or suppose a bond given by A. to B. cond<sup>n</sup> that in  
a limited time he marry C. & B. marries her  
in the mean time - the alleg<sup>n</sup> is discharged.

In this case it is not otherwise if the allegor (A.)  
shd prevent the performance of the cond<sup>n</sup>, in such  
case he is to be held immediately, tho' the time  
of performance had not arrived & Co 21. 1 Esp Ca  
430. 2 Ld 522. 6 Johns 110. Thus suppose A give a  
bond to B. conditioned to convey a dwelling house  
to B. on a certain day. & he burns it down. he  
is liable immediately - but if it had been  
burnt by lightning or by B. he is not liable  
till.

You perceive the effect of such a cond<sup>n</sup> is diff<sup>r</sup>  
in spec<sup>s</sup> & in gen<sup>l</sup>, cond<sup>n</sup> etc. - but the prin. governing is

in the same, in her court the interested contr-  
acts about is made in the purchase & shall  
not be defeated yet he be in fault, in her  
court must be had to do of justice to enforce  
the court, & the Ct will not interfere unless  
he was culpable in not perform<sup>g</sup> of cond<sup>n</sup>. -  
4. If <sup>the</sup> bond is given on cond<sup>n</sup> that J. C. <sup>shall</sup> appear  
in Ct at the return of the writ. & before it  
time he dies, the bond is discharged the court  
being her. & the failure not attributable to the  
obligor it aue.

Or A gives a bond to B. that he will export a  
cargoe of cotton, & a Lt is made prohibiting  
the exportation of it. The bond is discharged.  
Feb 19<sup>th</sup>.

A gives a bond to B. if he will marry C. on  
a certain day & before that day C. marries an-  
other - the bond discharged. 2 D. R. 240. & C. 92.  
Cao C. 274. 1 Inst 206.

A difficulty may here arise with  
you in reconciling this rule with one laid down  
above (the) That if one contracted & expressly & un-  
conditionally to do an act which was possible at  
the time but which was rendered impossible by the  
act of God the person was bound to it, this case was  
of a Capt court with a "sunk" in London. He  
at Wingham (S. C.) on a certain day, & bad weather pre-  
vented the performance. Now here the obligor  
is considered as an insurer of the performance  
of the contract & this is the intention of the



Impossible Cond<sup>n</sup> of the Parties. But in the cases above there was no such intention, it was not what the obligor was to incur as the impossible occasions by the act of God. - as if death in the case of the bail bond. - The bond of the Capt<sup>n</sup> was unconditional the latter was not. The diff<sup>y</sup> in the two cases is founded on a diff<sup>y</sup> of construction, not as is founded on a plain diff<sup>y</sup> of intention.

If a contract is made expressly making it obliger the judge whether the cond<sup>n</sup> is broken or not. The clause so appointing him is void. & the jury will consider the question without reference to it. Thus A contracts to build a house for B. the work to be done so &c, permitting B to decide whether the work is so done or not. - This last clause is void. as from the orig<sup>n</sup> principles of contracts it putting in the power of obligor to defraud obligor 2 N. R 408.

If a bond is conditioned to the performance of one of two things in the alternative & one of them becomes impossible by the act of God or of Law, the obligor is bound to perform the other, unless the former is as evident impossible by the act of the obligor himself. The rule was formerly laid down differently. & 2d. Coke says that if one cond<sup>n</sup> becomes impossible by any means the

the obligor need not perform the other, because he says it was the intention of the parties, he shd have his election of the two cond<sup>ns</sup>, & one being rendered impossible of perform<sup>ce</sup> he was as deprived of election & as a cond<sup>n</sup> to transfer a dwelling house or a tract of land in the alternative - & the house is burnt by lightning - by L<sup>d</sup> to be the contrary - w<sup>d</sup> be void - but the reasoning is surely much more satisfactory that as he was to perform one of the cond<sup>ns</sup> & is now deprived of his election he shd do what he can i.e. transfer the land! And the house been burnt by obligee the contrary w<sup>d</sup> be void. - 5 Co 22. Cap D 194. 1 Br & D 242. 10 Mod 26. Sal 170. Pow 595.

If a cond<sup>n</sup> becomes partially impossible by the act of God or of the law the party is obliged to do as much as remains provided the other party requires it. Thus C<sup>t</sup> gives a bond to B cond<sup>n</sup> for the conveyance of a house & farm, & before the time of conveying arrives the house is burnt by lightning - the land must be conveyed if C<sup>t</sup> requires it.

So again if procured by act of Law. In Ecc<sup>l</sup> body in Eng gave a bond for the execution of a lease for 60 years. & before the time of execution a St is made prohibiting the making leases by them for a longer term than 40 years. The lease must be made for 40 years if required  
By



Imposs<sup>ble</sup> cond<sup>n</sup> - Galligan - Flow 284. 1 Inst 332.  
Q.R. 254. 1 Dow 2148. 450. 2 it. 91. 1 Inst 209. 211. 2  
Col. R. 431. 2 WMC 160. 587.

When the condition  
is impossible at the time of making of  
contract & when it is annulled. -

With respect to these cond<sup>n</sup>s their operation  
does not depend as in the preceding cases  
upon the contract being valid or void. But on  
the contract being precedent or subsequent.

A Preced<sup>ent</sup> cond<sup>n</sup> is one not must  
be performed before the right or estate can vest,  
upon it can rest or accrue.

A Subseq<sup>ent</sup> cond<sup>n</sup> is one by which  
a right or estate already vested is to be defeated  
on its non-performance - & for this reason  
it is usually called a defeasance 1 Inst 206. 2.  
Col 156. 157.

If a cond<sup>n</sup> found<sup>ed</sup> to be impossible at the time  
of making the contract the right or estate which  
is the subject of the contract can never vest or take  
effect, the contract is void ab initio - for according to  
the terms of the contract the estate is not to  
vest until the cond<sup>n</sup> be performed, & this  
cannot be done. But if the cond<sup>n</sup> is subseq<sup>ent</sup>  
& impossible the cond<sup>n</sup> alone is void - as observed  
above. e.g. A fight is made, & a line is fixed  
does not go to Rome from London in twenty four  
hours. - here the fight is good, the cond<sup>n</sup> is void.  
But, suppose if cond<sup>n</sup> found<sup>ed</sup> as if B goes to Rome

Thome &c. the estate shall vest in, Jasp?" - now  
here the estate is never to vest unless the con-  
dition be performed - As it is impossible the estate  
will ever vest. 2 Bl 15; 1 Russ 105. 1 Pow 166.

It is a little un-  
markable that there is no rule laid down  
in the books, concerning the effect of a cond.  
precedent, which was possible at the time of  
making the contract but which becomes im-  
possible afterwards. But the rule of the  
court beyond a doubt be the same as above  
Thus D. makes a lease to B. to take effect  
if vest in Jasp? when B shall return from  
India, B dies before the time of contracting  
but he dies whereby the cond. becomes impos-  
- the estate is not to vest.

The rule is the same  
if the condition precedent is unlawful - as is said  
above if an unlawful cond. is annexed to a gift,  
contract, the contract is void in toto. & no estate is  
vested. & D. makes a conveyance to B. to take effect  
when B beats C. & not before, now there is nothing  
vested in present - & by the performance of the  
cond. no estate is obtained - for one shall not  
give a right by the commission of a crime  
or an unlawful act. 2 Bl 15.

If the unlawful  
cond. be subsequent the cond. alone will be void  
if being an unlawful cond. annexed to a contract,  
& c. And so is the <sup>case</sup> <sup>if</sup> that is an estate <sup>con-</sup>



Impos. Cond<sup>n</sup> Prod<sup>n</sup> & Delug<sup>t</sup> } convey in present,  
shall not be defeated by the non-performance  
of the undelivered cond<sup>n</sup>. 2 Pol 154.

If a conveyance  
making<sup>t</sup> is impos<sup>le</sup> at the time of making  
the contract it has no effect whatsoever. The con-  
tract is the same as if an conditional, viz.  
a feoff<sup>t</sup> in present to be void if feoffee does  
not go to Rome in 24 hours, from Lond<sup>n</sup>.  
The estate is good. - cond<sup>n</sup> void.

The rule as to cond<sup>n</sup>  
cancellation is the same whether the cond<sup>n</sup> be  
originally impossible, or becomes so after-  
wards, & either when rendered so by the party who  
was to perform the con<sup>tr</sup>. And cond<sup>n</sup> & c<sup>on</sup>  
with a preced<sup>t</sup> con<sup>tr</sup> impossible at the  
time of making it, is governed by the same  
rule - the con<sup>tr</sup> alone is void. It requires a  
penal bond to B. con<sup>tr</sup> to be void if he (A) goes  
to Rome in 2 hours. The con<sup>tr</sup> alone is void.  
The obligation remains good as a simple till  
Inst 206. 2 Pol 154. 1 Pow 206.

The distinctions as to this subject are so  
numerous it becomes needless for us to get  
at the governing principle, that then by  
termining may be assisted by the under-  
standing. If it is asked then why it is  
that the con<sup>tr</sup> & delug<sup>t</sup> be impossible at the  
time of contracting it has no effect at all  
when as of itself to the case with a con<sup>tr</sup> & delug<sup>t</sup>.

found to void the whole contract. Answer  
That when the cond<sup>n</sup> is subject as in a proff<sup>r</sup>  
or a bond, the estate in the first case is in  
presentia or in the 2<sup>d</sup> the final part  
of the bond or the alleg<sup>d</sup> a defection in presentia  
of the cond<sup>n</sup> being subject & also impossible  
it shall not defeat the estate. & this on the  
max, "that the law compells no man to do  
an impossibility." 2 Bl 157.

To save arg<sup>t</sup>, I sh<sup>d</sup> observe ag<sup>t</sup>, That  
in case of a bond or covenant being a cond<sup>n</sup>  
wh<sup>ch</sup> is impossible, incorporated in the body  
of the instrument, instead of its being an-  
nexed as a defeasance - is void in toto. The  
form of a bond with the cond<sup>n</sup> annexed is, "Know all  
men by these presents y<sup>t</sup> J. D. & Co are held & firmly  
bound to E. D. his heirs &c in the sum of \$10,000 to  
be paid to the s<sup>d</sup> E. D. & Co." Now now is an absolute  
& unconditional acknowledgment of a debt, a  
debitum in presentia. The cond<sup>n</sup> the follows -  
"The cond<sup>n</sup> of y<sup>e</sup> bond is such that if E. D. does not  
go to Rome &c. it shall be void." Now here the con-  
dition being impossible the law considers it  
as void. The former part remains a present debt  
it being distinct from the cond<sup>n</sup> - The latter  
part a cond<sup>n</sup> being merely intended to destroy  
the former. But if instead of this, the con-  
dition is incorporated thus, "E. D. & Co. agree  
that in case y<sup>e</sup> s<sup>d</sup> J. D. going to Rome &c. &c.  
& Co. covenant to pay \$10,000" the bond is



is void in toto, - for the condition is a con-  
dition precedent. & there is no objection  
in *Anscombe*. 1 Sal 172. 1 Paul 267.

Contracts Agreements required by Stat. to be in writing. &c.

at present alone to consider the C. L. cont.  
by parol & specially, they will be noticed  
under the count<sup>ty</sup> of contract. - Annuity res-  
pect to those required by Stat. in writing,  
& particularly to those affected by the Stat. of  
Frauds & Perjuries (29 Car 2<sup>d</sup>). In Lon we have  
a Stat. similar to this & believe that <sup>the Stat. of</sup> the Stat.  
has a like Stat. see also 1 Bayl. 186 189. 1 Paul  
269.

Our Con. Stat. as far as it extends substan-  
tially a transcript of the Eng. Stat. As this Stat. was  
long anterior to the making of those in  
this country & as ours are all substantially  
transcripts of the English - the construction  
w<sup>ch</sup> the Eng. Stat. have given their Stat. is pre-  
sently bind<sup>g</sup> upon us. for it is to be presumed  
that this was the intention of a Legis<sup>r</sup>. who  
found ours, or it w<sup>ld</sup> have been mentioned.

The Stat. of Statute  
substantially that in certain cases no show  
mention before no contract or agreement shall  
be suff<sup>t</sup> on w<sup>ch</sup> to found an ac<sup>ti</sup>o<sup>n</sup> either at Law  
or in Equity, unless there some note or mem-  
orandum of it in writing, & signed by the

the thing or the object chargeable thereby, is  
one. Vol. 10. 354.

The main & indeed the only effect of this  
St. is that certain words are now required  
to be in writing when at E.L. were not by  
parol. But the phraseology of the St. does  
not provide that the agreements enumerated  
shall be void if not in writing - but only  
that no suit at Law or Equity shall be  
maintained upon them. - And it is remarkable  
will be found material in certain distinc-  
tions to which I shall refer. The St. introduces a  
new rule of evidence by requiring written in  
some cases in which at E.L. parol would have been  
sufficient. But the inherent force of parol agreements  
is not affected.

The classes of contracts included by the  
Statute are six. Five embraced by the St. of Con.  
are but five - omitting the last class in the  
Eng. St. - Three of the Eng. St. are the following.

1<sup>st</sup> A promise by an Exor. or adm<sup>r</sup> to  
answer out of his own estate any debt  
or duty of his testator or intestate.

2<sup>d</sup> The promise of one person to an-  
swer for the debt default or miscarriage  
of another.

3<sup>d</sup> A promise made in consid-  
eration of marriage -

4<sup>th</sup> Contracts or sales of Land, tenements  
or hereditaments or of any interest



Stat of Frauds &c. { in testimony or concerning  
them. — The expression "contracts or sales of  
land" tho' it can only undoubtedly mean  
contracts for the sale of lands, or sales of  
lands.

By the 1<sup>st</sup> of the Stat. any lease or sale  
of land &c. operates as a lease at will  
only. & yet it be a lease for a term more  
or less than three years & reserving out of at  
least two thirds of the improved value  
of the thing demised. — So that a lease  
last of this term is good. In Com this  
exception is not adopted, but all leases  
are upon the same footing.

5<sup>th</sup> Cont<sup>t</sup>. not to be performed  
within a year from the making of  
them. cont<sup>d</sup>

6<sup>th</sup> and last class of the English  
Stat. respect sales of goods of £10 value or  
upwards — But this class is not includ-  
ed in our Stat. — I therefore shall say no  
more of it — see 1<sup>st</sup> of 50 R. 4. 2<sup>nd</sup> of 10 R. 63. Stat.  
Stat. 2<sup>nd</sup> 111.

The object of public policy proposed by  
it was to prevent fraud & perjury, or rather  
fraud tho' the medium of perjury, & hence  
if it is denominat<sup>d</sup> the Stat of Frauds & Perjuries —  
the object was to be effected by preventing the  
proof of & contents of the above several descript<sup>ns</sup>  
by parol evide<sup>n</sup>ce — it being supposed & affirmed to  
know them without the solemnity of written evide<sup>n</sup>  
ce. —

1<sup>st</sup> in promise by E<sup>r</sup> within or Com<sup>r</sup> to  
answer for a debt or duty of his Ex<sup>r</sup> & Intest<sup>r</sup>  
must be in writing &c. —

Under, that it has been  
said that if the Ex<sup>r</sup> or Com<sup>r</sup> has a pet<sup>r</sup> support  
under the promise, altho' it be by parol  
notwithstanding the St of Edw. it shall bind him  
because it is said a pet<sup>r</sup> constitute a consid<sup>r</sup>  
advantageous to E<sup>r</sup> &c. It transfers the duty of  
testator to himself personally & Veg 12.5.6. 5 B.R. 8.  
This however is a mere dictum, & there is no  
judicial opinion to support it, indeed that  
opinion has been overruled by two writs of error,  
the one in the Exchequer. The other in the  
House of Lords. The act, a pet<sup>r</sup> cannot be sub-  
stantiated without a special of this clause of  
the St. even if the reason be not false, it  
will not support the opinion, but it  
is false — The duty of test<sup>r</sup> is not transferred to  
E<sup>r</sup> absolutely by his having a pet<sup>r</sup>, — for E<sup>r</sup> is  
liable only by extent of the a pet<sup>r</sup>, & the  
judgment is rendered ag<sup>t</sup> him in de bonis test<sup>r</sup>  
atoris & not de bonis propriis — And ag<sup>t</sup>  
the St does not proceed on the ground of the  
promise being made with, or without con-  
sideration. But the idea has even pre-  
vailed, that if there was a consid<sup>r</sup> in the gift  
the Ex<sup>r</sup> he was bound. Now if this is the case  
he is as liable now since the St on his parol  
promises as he was before at E.L., for at E.L.



St. of Frank & Regt. } Ex. L. he was not liable if capt on  
suff. consid<sup>n</sup>. The truth is a parole promise with-  
out consid<sup>n</sup> will not bind in any case. &  
even the St. it will not bind even if  
made with consid<sup>n</sup> neither will the prom.  
if in writing bind him under the St. if made  
without consid<sup>n</sup> see Sta 573. 5 BR 690. 7 id 350.  
1 Rob 206-7.

Early in the last century it was decided  
by L. King, that the mere proof of a debt in the  
hands of Ex<sup>t</sup> and raise the implied promise  
and charge the Ex<sup>t</sup> personally. This is not  
only repelling the St. but directly opposing  
the established prin of the ancient C. L. that  
Ex<sup>t</sup> is liable only per sonis testatoris. see King  
opinion Cow 2 80. 5 BR 690. 7 id 350.

If an Ex<sup>t</sup> has  
not assets it is clear he is not bound. & a prom.  
by him under such circumstances is no more for  
a prom. by a stranger. & still the possession of  
assets will not of itself constitute a consid<sup>n</sup>.  
It therefore becomes necessary to resort to the rules  
relating to the proof of his having a debt.

Not long since it was solemnly  
ruined, that the admission of an Ex<sup>t</sup> to an ar-  
bitrament was an admission of a debt. but  
the decision has been since overruled, & indeed  
it is strange such a decision was ever made.  
For it may again be desired Ex<sup>t</sup> to do it  
to ascertain the amount of the debt, & to

to discover whether he had assets sufficient  
not - 1 RR 641 c. 5 it. 6. yet 453.

But if upon scrutiny  
into an arbitrament it is awarded that he  
shall pay a certain sum, the award is proof  
of assets to that amount & he cannot after-  
ward deny the fact, for the arbitrator did not  
award against him but on discovery of assets, & the  
judgt. of arbitrator is in general as sacred &  
unimpeachable as the judgt. of a Ct of Law  
4 RR 453.

Ag. it has been held that the proof  
of interest by G. was an admission of assets  
to the amt. of the principal of the debt. &  
as the mca was qualified it threw the onus  
probandi upon the C. & Co. But this rule is  
unreasonable - for G. may have had just as many  
enough to satisfy the interest, & in such  
case it was his duty to pay it. - However the  
rule is now exploded. 5 RR 6.

But the unqualified acceptance  
of a Bill of exchange by an G. is such  
an admission of assets as will bind him per-  
sonally, & so. & Bill of Exchange is drawn upon it in  
his life time, but not presented till after his  
death, & then to his G. who accept it, now  
this is a plain admission of assets for if he had  
no assets he ought not to have accepted it. Indeed  
the grand cardinal prin. of the Law of Ex. will not  
allow him to deny it, for by the denial the interest



Att. Gen. v. Int. of others not being  
3 Wils. 2. 2 St. 1260, 1802 622, 2 Burr 425, 1 Br.  
187. Chit. Pl. 3. 112.

A transfer by the Ex<sup>r</sup> of a  
bill of exch. is a similar admission - for  
the indorsing of a bill raises the same re-  
sponsibility as the drawing a new one  
of the drawer of a bill always implying prom-  
ise to pay if drawer does not. 2 St. 1260.  
3 Wils. 1. Chit. Pl. 11. 112. -

But if the promise of Ex<sup>r</sup>  
to answer for the debt or duty of his testator  
be in writing, still he is not bound in his  
suff<sup>t</sup> consid<sup>n</sup> be shewn, for the object  
of the Act not to subject the Ex<sup>r</sup> on all  
his written contracts, but to prevent his being  
subjected unless they be in writing; his lia-  
bility on then written prom<sup>s</sup> is the same as  
on his parol prom<sup>s</sup> before the Act. Thus the  
mere fact of his test<sup>r</sup>'s indebtedness is not suff<sup>t</sup>  
consider<sup>n</sup> to suff<sup>t</sup> his written prom<sup>s</sup>. but for-  
feiture of a writ is suff<sup>t</sup> consid<sup>n</sup>. 7 St. 350m.

The precise crit<sup>er</sup>  
enough to determine whether the Ex<sup>r</sup> is liable  
in these cases on his written prom<sup>s</sup>, is, whether  
the case be such, as that, before the Act, he  
would have been liable on his parol pro-  
mise. Prob 202. 10 W. 126. 7 St. 350m.

and to make  
the Ex<sup>r</sup> personally liable upon his promise  
in

in writing, there must have been a gift  
debt or duty which bound him as Exr., or in  
other words making a gift to the estate of his testator.  
The promise here is, to pay some debt or of his  
testator. Now if there is no such debt existing  
at the time, there is no consideration - and he  
is not to be bound. 2 Saunders 196. God 44. Prob 206.

The promise must

to support the prom. must appear in the writing  
for the St does not say the "promise" must be  
in writing - but the "agreement". Although an  
"agreement" is considered to embrace whatever  
enters into the contract on both sides, of course  
includes the consideration. Upon this construction  
is the rule founded. 5 East 10. Gil 307. Prob  
116. 207.

But an Exr. to take advantage of this clause  
of the Stat. must have been Exr. at the time of making  
the prom. ~~and~~ i.e. he must have been actually  
invested with his office & go. & promise  
on cond. he become Exr. of Gt. he will pay a  
certain debt his testator not being dead at  
the time, - the prom. is not within the St. -  
see 11 C. 30. Prob 201.

As it is after the death of orig. debtor, prom.  
to pay the debt provided he be appointed Admin.  
the prom. is not within this clause of the St. &  
whether it comes within any other depends  
upon the nature & terms of the contract. Ambler



Chas. B. P. Rec<sup>d</sup>  
C. B. P. Rec<sup>d</sup>

In declared, on a prom<sup>t</sup>

by an Ex<sup>r</sup> to pay the debt of his test<sup>r</sup> it is not  
nec<sup>ess</sup>ary to show what he had a pet<sup>r</sup>, for if he is  
subject at all, the judge goes on & de<sup>cl</sup>ares  
prom<sup>t</sup>is, for the St<sup>t</sup> treats him as making a  
promise to answer the debt & of test<sup>r</sup> out of  
his own estate.

But when the act<sup>r</sup> is  
not ag<sup>re</sup>ed to as such the judge goes de<sup>cl</sup>ares  
testatoris, & so he is not to be subject unless  
he has a pet<sup>r</sup> - see in the former case (Vol.  
205-6.)

2<sup>d</sup> Clasp. The said class of prom<sup>t</sup>  
under the St<sup>t</sup> consists of those made by one  
person to answer for the debt of another or the  
carriage of another.

Under clause there is established in construction  
the Gen<sup>l</sup> Rule of distinction. If the promise  
made by one for the benefit of another is original  
it is not within the St<sup>t</sup> - & so may be by parol.  
But if such promise be collateral it is within  
the St<sup>t</sup> - & so must be in writing. 2 Ray 109; Card  
22; 1 Wils 205; 3 Burr 1389.

The words "original" & "collateral" are not used in  
the St<sup>t</sup>, the distinction between such promise  
is raised by construction of the St<sup>t</sup>.

By a collat<sup>e</sup> prom<sup>t</sup> is one made by one  
wh<sup>o</sup> is in effect a promise to ans<sup>r</sup> for the debt  
of another or the carriage of another. But an  
orig<sup>l</sup> prom<sup>t</sup> is not a prom<sup>t</sup> to answer for  
the debt of another.

Capital Limited, are similar in  
three classes of cases. The person who  
son for whom the prom. is made is not in-  
volved at all, & to the person from whom it  
is made. & gr. extends as prom. for B. & C.  
in a case in which B. is not a member now & then  
B. & C. This case cannot in any respect be distinguished  
from the 1st. of cases for I felt so, another. (B. & C.)  
281. 3 Burr 1421. Park. C. 212. Prob. 212, 216.

2<sup>d</sup>. The prom. is orig. & not within the 1st.  
where the third parties liability, is extinguished  
upon the prom. being made, but this has some-  
times been questioned, Thus I say to B. "I will pay it to you"  
I have the bond - the promise is held to be  
orig. & I think correctly so, for it is not a prom.  
to pay I debt of J. S. but only pay when the indebted-  
ness of J. S. ceases. see supra post.

3<sup>d</sup>. The prom. is orig. when there is a new  
consideration arising out of a new transaction  
or request to the consid. moving to the prom.  
i.e. made for his benefit - for in cases of this  
sort the orig. debt is lost the measure of what  
shall be paid for another subject as will be  
seen upon investigation - see supra 2 Burr  
1886. 3 Exch 86. 2 East 325. Prob 232. -

Now to sum up the reason why in all these  
cases these prom. are called orig. I believe.  
That in construction of law they are not  
promises to answer for the debt of another  
tho.



It is to be observed that the language of them is in  
part. On the contrary when the prom. of  
one person is in aid of a subsisting & contin-  
uing liability on the part of the person for whom  
the prom. is made, or to procure a credit for  
him &c. or merely to furnish an additional  
remedy as agt himself, in favour of prom<sup>ee</sup>  
the prom. is collateral & within the St. 5th Sect.  
2 Wils 94. 116 206. 2 Ray 1085. Dal 27. Cow 460. 1  
Wils 120. 184 P 156. If it is asked why then  
are collateral I answer by replying - the con-  
verse of the former reason, that these promts.  
of 4 description will be found to be, always  
in construction as well as in form, to answer  
for & debt so & another.

As to Original Promises.

You will also recollect 1<sup>st</sup> that when the person  
for whom the prom. is made is not answer-  
able to 4 person to whom it is <sup>made</sup> this prom. is origi-  
nal. 4. ex. 4. says to a trader, "deliver goods to J. S.  
for his use - & I will charge them to me". Now  
here this is for the benefit of J. S. - but he is not  
the debtor, nor ever has been. - for 4 goods by the  
terms of 4 contract are debt charged to 4.

So then, 4. says "deliver the goods to J. S. on my  
account" - or, "I will pay you. - the cases  
are the same - & plainly not within the St.  
2. Wils 94. 2 Ray 1087. 184 P 120.

On the other hand, If 4. contracts with  
a trader thus, "deliver goods to J. S. for his  
use

use of the now not pay you I will" the promi-  
s. collateral, for there J.S. is the debtor, & promi-  
stands merely as a security. The prom. is to  
answer for the debt of J.S. & to give credit for  
him & to furnish "add. remedy for prom." by an act of 27<sup>th</sup> March 1835. Sol 28. Cal. 2.  
184. 1834 120. Low 229.

When the prom. is in this form  
"furnish J.S. with bread & I will see you paid"  
the later opinions consider it as collateral, at  
least prima facie collat. & this is deemed  
as the law. You observe that when the words  
were "deliver goods to J.S. & charge them home"  
or "on my acc<sup>t</sup>" &c. &c. the prom. was orig<sup>l</sup> but  
in this case the l<sup>ts</sup> consider the promiser as  
but a guaranty, & that the intention of the per-  
son is that J.S. shall stand as debtor. But the  
opinions on this case are not uniform. The  
only question to be decided is, whether J.S. was  
to be considered as debtor or not. Goldsmith  
is somewhat doubtful whether he was so con-  
sidered, - it depends much upon the construction  
that wk. Rad. men wd. put upon the words  
"I will see you paid". 2 D.R. 80. 31. 2 Ray 241. 1 W.B.  
P. 155. Prob 223. 2 W.B. Sol 55.

L<sup>d</sup> Mansfield once held & I doubt whether he was  
not correct, that if prom. before the goods were  
delivered was (not) orig<sup>l</sup> but if made afterwards  
i.e. after there was a debt created by the J.S. then the  
prom. was collat<sup>l</sup>, In the former case Mansfield



~~At the trial~~ <sup>the</sup> ~~plaintiff~~ <sup>defendant</sup> ~~considered~~ <sup>considered</sup> the prom. as debt. & after a decision was overruled. Butler argued there was much force in the distinction & 2 R. 21. Prob. 219. 211.

However ~~an~~ <sup>in</sup> still later cases it seems if when the prom. is in this form, the Ct are at liberty to consider all the circumstances of the case & the situation of the parties - & from ~~of course~~ <sup>of course</sup> they may be led to consider the prom. only. the case prima facie collat. 1 B. & P. 58. Prob. 212. 223. 4. 90. A person was about to make a voyage to Canton. & at. says to the husband. "Will you man the goods & I will see you?" within three months - he considers the seam<sup>n</sup> as being without prop<sup>y</sup>. so that the money can't be raised out of it. - Now here the seam<sup>n</sup> cannot pay for he is "about" at that time. the prom. & prima facie collat. - but from the circumstances we conclude it to be orig<sup>n</sup>.

Say a prom. in this form. "If you do not know W. & M. you know me & I will see you paid" was proven collat. & I think correctly. - For here was an enquiry into the credit of W. & M. in consequence of which the prom. was made. - That is plainly nothing more than a guaranty. - 2 B. & P. 50. Esp. 211. 2. Prob. 216. 211.

Say a prom. in this form, "I promise to deliver you a horse to be delivered to you" the prom. is plainly collat. - it is to answer for the default

default of another - I am to be of the does not  
discharge the duty avoid being undertaking  
I will answer for it. It stands in the same  
acts of bailer, & I guarantee his responsibility,  
but do not exempt him of his liability. And  
it is a general rule. That a prom. by one person  
that another shall pay a sum of money or  
do an act, for which the 2<sup>d</sup> person not be liable  
on failure, is collateral. Rob 222. 219. Lat 47. 2 Ray  
1085. 1 Ba 75-6. 3 Lat 15. Holt 606.

(But if one stipulates  
to answer for the failure of an act by a 3<sup>d</sup>  
person for the not doing of which that 3<sup>d</sup> person  
not be liable, - the prom. or stipulation is  
orig<sup>n</sup> ex. gr. A. promises B. that C. shall pay a  
sum of money, & if C. fails then B. (A.) will  
pay it - C. not being liable or indebted at the  
time, nor privy to the contract - The prom.  
here is strictly orig<sup>n</sup> tho' in form it is collat<sup>n</sup>  
- for as C. is not indebted, nor privy to the contract  
there is no oblig<sup>n</sup> on him to pay the money  
& so can be guilty of no mismanagement -

eg<sup>n</sup>. If I apply at a livery stable & tell the  
keeper, that if he will let me have a horse  
for a given sum, I will pay him, (C. is  
not being privy to the contract) & if C. does not  
I will - the prom. tho' in form collat<sup>n</sup> is not  
so substantially - for I only direct ~~the~~ the keeper  
to call on C. who is as my agent, but not  
the debtor. Chob 222. 223 -



St. D. L. Chig. Prom. 2  
Engraving

If an Agent buys goods

at an auction without disclosing the name  
of his principals the prom. raised by his  
bidding is not within the St. - for here  
altho' as between himself & principal he  
prom. to pay what is the debt of another  
still as it regards the auctioneer the prom.  
is orig. for he knows not of principal & Bur  
1921. Peake C. 213.

To render a promise collat. it  
seems to be nec<sup>ss</sup>. not only that the prom.  
for whose benefit it is made shd be liable  
but also that he shd be, or become so at  
time the prom. is made 2 Ray 1065. Prob 219,  
222, 232. This rule is illustrated by the above  
case of hiring a horse &c. Now if the 2<sup>d</sup> per-  
son shd agree, even in writing to pay my  
prom. and still be orig. for being orig. at  
time of making, matters of post facto will  
not make it collateral - but his promise  
is within the St. acmt.

A prom. by one of several  
persons who are already liable is not within  
the St. - it is orig. i. e. a judg. as to debt.  
One promises to pay the cost, it is bond  
even if it be paid, for Aff may have collected  
his costs of either 5 Mch 205, 213, Comb 392, 2 East  
325, 2 Esp R 464.

When accord<sup>d</sup>. to the distinction  
here taken the prom. is orig., the genl. incl.

in a sum <sup>it is</sup> a proper remedy or form  
of ac<sup>n</sup> and can I say "deliver goods to J. & if he does not pay you  
I will" - this ac<sup>n</sup> may be maintained ag<sup>t</sup> me.  
I am the only debtor

But if I give a writing the effect of which  
is, "deliver goods to J. & if he does not pay you  
I will" genl. indel. ac<sup>n</sup> will not lie - it must  
be a special ac<sup>n</sup> on the case - for it cannot be  
said I am the debtor, & my promise is but a  
guaranty - & coll<sup>o</sup> 10 Bur 373. & Lev 363. 2 Ray 1085.

In any prom.

made in consid<sup>n</sup> that the debt ag<sup>t</sup> the 3<sup>d</sup> person  
be ~~extinguished~~ <sup>is</sup> orig<sup>n</sup>. for this is not a prom<sup>t</sup>  
in aid of a continuing or subsisting liability  
on the part of the 3<sup>d</sup> person, or to furnish him  
a credit. & tho<sup>t</sup> there was a debt ag<sup>t</sup> a 3<sup>d</sup> per-  
son, that debt is to cease before prom<sup>t</sup> & becomes  
latter. 4. ex. I say to C. turn the bond you hold  
ag<sup>t</sup> J. & I will pay it. & his liability commences  
not until the bond is turned B Bur 1338  
1 H Bl. 130. doubted Prob 223. & questioned on one  
side 1 H Bl. 130. however the rule seems to me  
to be correct, & from prin. tho<sup>t</sup> there is no judi-  
cial decision upon the point, for the debt  
of J. is here only made the measure of damages.  
& with regard to the consideration that is suf-  
ficient, for the prom<sup>t</sup> is to the danger of the  
minee

again when the promisor becomes the  
purchaser of the debt of another, & promises



It is said, however, that the promise to pay it to the person trans-  
ferring it - the prom. is not within the Stat. ex-  
cept it says, "if you will transfer to me the  
debt you hold ext. I will pay you the  
amt. of it, (or a certain part of it) this is merely  
a purchase of prop." & not a prom. to pay a  
debt of another - it is a prom. to pay for a  
transfer of a debt of another from  
A. to B. 1 M & B 130. 2 East 325.

3<sup>d</sup> The third case  
might be said to be, where there  
is a new consid<sup>n</sup> arising out of a new trans-  
action or assent & moving to the promisee.  
- this tho' it be in terms a prom. to pay the  
debt of another, is still ext<sup>n</sup> for the orig<sup>n</sup> debt  
is but the measure of damages. This was the  
case of Williams & Lister 2 Bur 1584. The Lord  
discontinued the goods of his tenant for rent, & diff  
promised him that if he wd relinquish his  
claim he (diff) wd pay the rent. - this prom. tho'  
to pay a debt of another was held good tho' it was  
by Hard 6 3 Bur 1586. Peckham 2 Q B 2 East 325. This  
case has been regarded with some jealousy, but  
I think it correct upon principle. It has  
been recognized by L. Kenton 2 in its fullest  
extent, so it is now beyond the reach of doubt.  
- the orig<sup>n</sup> debt is here only a measure of damages  
for the abandonment of the lien. Lord Mansf.  
says "the case has nothing to do with the Stat. by  
this I suppose he means, that in a proper sense

sense it is not a prom. to pay the debt of another but it is to pay a debt the amount of wh<sup>ch</sup> is the debt due from another. 3 Esp. 56. 3 East 325. Cal 22. Prob 282.

and where a person is under a prior moral oblig<sup>n</sup> to pay for the benefit received by another, his prior promise will bind him, even, if a physician gave medicine to a pauper without permission of & acquiescence of the poor. - the prior prom. of our author binds him, for he was under a moral oblig<sup>n</sup> to pay, & the release was placed upon his honesty & humanity. - Prob 281. Rich. 213.

### Discharge

Rules. wh<sup>ch</sup> can't be well arranged under the former class. -

A prom. to pay a certain sum in consideration of promisee's withdrawal of a suit commenced ag<sup>t</sup> a 3<sup>d</sup> person for a battery has been held to be orig<sup>l</sup> & so not void in the St. - for there then was no debt due at the time of making the prom., for no default had been supposed or judge rendered, &c. &c.

the promise was not to perform the same duty the 3<sup>d</sup> person was to perform, provided he had committed the battery. 1 Wils 305. 7 SR 204. 2 Day 467. Chas E 214.

Prob 208. 233-4.

Indubitably this is a prior promise within the clause of the St. then must be some debt or duty ag<sup>t</sup> the party for whose benefit the prom. is made, ascertained at the



at the time, & capable of being ascer-  
tained at the time, i.e. by reference to some  
known standard or market price. Now  
in case of a battery no one can ascertain its  
value by any such standard

And a prom.

To pay in consid<sup>n</sup> of forbearance of a debt  
not agt a 3<sup>d</sup> person for a debt is collateral, for  
there then is a subsisting debt & engagement to  
pay it to end<sup>n</sup> in behalf of debtor - and this  
consideration is suff<sup>t</sup> to sustain the ac<sup>n</sup>. But  
1887, 3 M. & W. 94. This case differs from  
that of Williams & Leper in this, that here there  
is no lien surrendered as is the case there in  
favour of prom<sup>t</sup>, & no interest assigned to him

And a prom.

to pay of damages  
in consideration of promisor's forbearing an ac<sup>n</sup>  
of trover agt a 3<sup>d</sup> person has been held to be  
collateral & within the St. & this I think  
correct, for in an ac<sup>n</sup> of trover the law does  
not give vindictive damages as in trespass  
or battery, but it makes the value of the  
property the rule of damages - so that  
here the damages are a sum certain & Day  
456.

A prom. to pay the debt of a 3<sup>d</sup> person pro-  
vided prom<sup>t</sup> release that 3<sup>d</sup> person then  
on same prom<sup>t</sup>, is collateral - there is  
no decision deciding this but I think it comes  
for your peruse, the debt is not discharged  
4

If the eventual security is not above credit, for  
the 3<sup>d</sup> person be discharged, he may be im-  
mediately retaken.

If however the debtor had been taken on Exec<sup>u</sup>  
Annuity on such a promise, that promise  
it be right for such a release or discharge  
is ipso facto a discharge of the debt. — This  
case wd come strictly under the rule elap. of Crag  
from: 4 Ba 222. 1 SB 557. 6 Cl 525. 9 Cl 421.

It has been said  
in some cases that when there arises a new consid<sup>n</sup>  
a special prom. to "answer the debt &c of another"  
is good, & this whether it moves to the prom<sup>r</sup> or not  
arises out of a new res gestae or not, or whether  
orig<sup>l</sup> debt is discharged by the prom<sup>r</sup> or not. — but  
this rule is ag<sup>t</sup> all the cases since the 1<sup>st</sup> & indeed  
virtually repels the 1<sup>st</sup> & 2<sup>d</sup> prom<sup>r</sup> to pay  
the debt of b. on forbearance of a suit ag<sup>t</sup> him (C)  
There is a new consideration but the prom<sup>r</sup> is  
collateral & smiles 330. 3 Mur 1887. but see contra  
2 Wils 94. 1 Stra 873. 10 W 291. 2. 2 Day 457. 7 BR 401. Prob  
232 & 39.

It has been determined in Com. that a written  
prom. by one to pay the debt of another provided  
the debtor does not pay, is discharged if the prom<sup>r</sup>  
forbear a suit ag<sup>t</sup> the debtor & this I think  
is correct. For all the prom. imports is a guarantee  
of the debtors honesty & ability. It is an engagement  
to pay in case he will not, & as if the Cred<sup>r</sup> then  
his neglect to enforce the claim suffers the debtor



St. Grand J. 2<sup>nd</sup> { delta to evade it. He should  
lose the debt thereby 397.

Observed above (p. ) that  
from the phraseology of the St. it appears, that  
it was not the intention of the Legislature to  
render void parole promises; but to introduce a  
new rule of evidence, and hence it has been deter-  
mined that a judicial confession of debt & elud<sup>d</sup>.  
The necessity of evidence will take the case out  
of the St. ex gr. Prom<sup>t</sup> being said upon his prom.  
puts in a plea of tender. - This plea is a confession  
of debt, & if he does not support it judg<sup>t</sup> must  
go ag<sup>t</sup> him, unless his plea is double (as may be  
by St.) or a new trial is granted - & if he does submit  
to the plea St<sup>t</sup> must take the tender & pay the debt.  
Now if the St. made parole promises void, neither  
a plea of tender or any other could be allowed, but  
the object of St. is as above. R.E.D. Parks Rep. 13. Parks C.  
234. W. 4238.

When accord<sup>d</sup> to the distinctions already  
taken it is necess<sup>y</sup> the prom<sup>t</sup> should be in writing, it  
is a rule not necess<sup>y</sup> for prom<sup>t</sup> in declaring upon  
it & aver that it was in writing - for the St  
does nothing more y<sup>t</sup> introduce a new rule of  
evid<sup>n</sup> & affords not the R.L. rules of plead<sup>s</sup>. Cov.  
259. 12 M<sup>t</sup> 54. 1 Ba 655 2 W<sup>t</sup> 145.

Since if an ac<sup>t</sup> is put upon any of these or a writ  
under the St. without avering it to have been in  
writing, it will go upon a demurrer to the  
plea, for a dem<sup>r</sup> confesses the fact - & the St.

It only introduces a new rule of evidence. And indeed  
the L<sup>t</sup> say that in such case they have a right to  
conclude y<sup>e</sup> prom. is in writing, for such a prom.  
may be introduced in evidence. & the dem<sup>r</sup> concedes  
whatever the opposite party has a right to introduce  
& say. There is no danger of fraud or perjury arising  
out of this rule 7 B.R. 350m. 1 Root 77-8.

But when a written  
promise is pleaded in bar of another act? it is, unless  
any for debt to aver it to be in writing - the only  
reason for this appears to be, that greater strictness  
is required as to <sup>in</sup> pleas in bar than in declarations  
for ~~in~~ the former allows one cause of act? & is just  
to rebut it 2 Wils 49. 2 B.R. 279. Ray 450.

But in both cases  
it is indispensable to show a suff<sup>t</sup>. consid<sup>r</sup>. - for  
as stated above the L<sup>t</sup> will not allow a recovery  
unless the prom. be in writing, neither does it  
follow of course, that it admits a recovery when  
it is in writing - it does not remove it from the  
rule of a consideration 4 B.R. 350. 1 Root 202.

of collateral  
promise to pay the debt of another & also to do  
some other thing, is within the L<sup>t</sup> in ~~the~~ <sup>the</sup> ~~and~~  
as to the debt merely - for one part of an entire  
contract cannot be severed from the other as if one  
part of it is void the other is so also. - Thus a collateral  
prom. to pay a debt of another & also to deliver a bushel  
of wheat & not deliver the wheat 2 Port 223.  
7 B.R. 201. 75 204. 1 N. Rep. 126. Roberts 212. 231. 273.



St. Paul & D. Chap. 3 To determine when an implied contract is to do diff. thing is entire, there is this universal criterion, when the form & structure of the contract is such that you must plead or declare upon the whole & so that the declaring &c upon a part only and make a variance the understanding is entire & not severable - i.e. the necessity of it will enable you to determine whether it is within the rule or not.

Third Chap. of agreements under the  
It are those made in consideration of marriage.

This clause does not relate to the mutual promises between individuals to marry each other, - such promises are good by parol. But it relates to those promises made in consideration of marriage as by way of marriage settlements or family provisions P.R. 280. 1 Forb. 179. 2 Bay 286. 1 Sha 24. Prob 190. 1 M & W 18. 1 Pr Ch. 526. 1 Bosw 277. 278. con to Sect 9. 111.

The rule introduced by the Act requiring these agreements to be in writing has but the exception of those cases of past performance, vide hus. Inst. 40

It was once a question whether a parol agreement of this kind and not be binding, if it was stipulated (by parol) that it should afterwards be reduced to writing - This and under the Act is totally ineffectual - Pr Ch 412. 1 M & W 504. 1 Ch. An. 125. 1 Bosw 279. 281.

If however such a stipulation is made and  
is <sup>not</sup> prevented by the fraud of either party, it  
the marriage takes effect; Equity will enforce it  
without remedy on the ground of fraud, as I take it.  
But this is not because the contract is made any  
more binding on the account of the fraud, or afford  
more room for the action of equity, but because  
the enforcing of the agreement is the only way to  
prevent the operation of the fraud. 10 Ch 526. 1 P.W.  
518. 1 Eq. 621. Rob 196. 7. 198.

Indeed whenever fraud is cog-  
nizable in a bill of justice, fraud void is always  
admissible to prove it. For neither void of fraud  
is no more to be punished, than that of robbery or  
murder. -

A bond prom. made in consid<sup>n</sup> of mar-  
riage is of itself a suff<sup>t</sup> consid<sup>n</sup> to support a  
contract made by the parties in pursuance of it  
after the marriage. At this the the promise itself  
could not be enforced - for the it does not make  
the bond promise void - 2 Lev 445. Lth 236. 1749.  
195. Rob 177. to 200. -

It has been determined that if a  
letter signed by one of the parties & containing  
the terms of an agreement of this kind is a suff<sup>t</sup>  
memorandum in writing under this clause of  
the St. And I presume it would be under any other  
as no particular form for the writing is pre-  
sented - it is a suff<sup>t</sup> mem<sup>o</sup> recognizing the bond agree-  
ment. 179. 2 Vent 361. 10 Ch 560. 30th 503. 2 Pat. Ch. 52.



St. Francis. Mar. 5. When however the writing introduced is in the form of a letter, it may appear that the other party assented to the terms proposed in it, & acted in contemplation of them at the time of the marriage otherwise the case will not be held to be within the St. here in a case in which a father wrote a letter to his daughter in which he promised to give her £5000. on her intended marriage - the letter not being shown to the intended husband - was held not to be a suff. writing within the St. - for here there was no agreement, the husband did not act in contemplation of it. 2 P.W. 85. 1 P.W. 287. 290. 9 Mod. 3. Prob 107 & 192. 1 P.W. 179.

And a letter written to ones own agent stating the terms of the agreement made with another by parole, & according to decisions a suff. writing within the St. is, it is a suff. writing memorandum or note of the parole agreement. 3 Atk. 513. Prob 121.

But a letter merely stating in gen. terms that such parole agreement has been made, without specifying the terms, is not suff. writing &c. for want of certainty, & much more which are required in these letters than in the agreement itself - for the agreement in terms being gen. the letter seems the doubt to be gen. but in the case of a letter parole evidence (not the St. words) would have to be admitted to explain it. Ch. Ch. 550. 1 Atk. 466. 1 Atk. 12. 2 Eq. 8017. Prob 106. 141.

The fourth class of cases under the Statute are contracts or sales of land tenements or hereditaments or of any interest or concerning them - the words "contracts or sales of land &c" is meant to cover the sale of lands & sales of land.

With regard to the term "land tenements & hereditaments" it has been determined that the sale of a thing annexed to the land in contemplation of a future severance is not within the Statute - this of parcels of trees growing on the land was held good by Lord Abinger - these are in the nature of chattels.

The second case now arose, was on a general sale of potatoes growing on the land, great whether it was within the Statute the Lord held it to be within the Statute, for they are not to be severed without breaking the ground & are more within the term "land".

The last case was on a parcel sale of grass growing on the land - held not to be within the Statute.

In the parcel sale of the manure of a mill wheel in the mill was not within the Statute - 3 Lev 65, 5 East 602, 11 B & C 302, 2 Bay 182, 3 B & P 262, 1 B & W 397, 2 Day 476.

Agreements between tenants & owners of the land as to the division of the crops, are good by statute for the crops are not considered as part of the land, the share is to be paid to the owner as rent - it is the same thing as paying money - 1 Bos & Pul 397.

and under this clause of the Statute as under the former one. A parcel agreement has



St. Paul & N. W. Ry. Co. v. Ellett does not become binding, be-  
cause it contains a stipulation that it shall  
afterwards be reduced to writing - If it is afterwards  
reduced to writing the St. is satisfied; but it is  
not binding if it is not - Indeed if it was  
binding the St. wd be virtually repealed 1 Vern 156, 1  
159, 1 Eq. Cas. 59, 1 R. & W. 775. 2 B. & L. 202, 2 B. & L. 555, 556, 1 Dow  
281, 297.

It has been resolved in Lon. that a parol promise  
to pay the consideration money of land actually  
conveyed is good - for the contract is complete on the  
part of the vendor in having conveyed. & the promise  
to pay the money has nothing to do with the  
land or any interest in the land. And there have  
been two or three cases, in this state, in which  
having been conveyed by deed, the St. held vendor  
shd pay the value of the land on an implied  
promise; but these decisions were overruled in  
the case of Braun v. Hatlin (1 Day 295,) so that  
the law now is, that a parol promise to pay  
in such case is good & binding. but the law will  
not raise a promise 1 Root 778, 499.

It has also  
been determined in Lon. that a parol promise by  
grantor at the time of making the grant to  
pay for any deficiency in the quantity of the  
land, is not within the St. neither is this  
decision now assumed upon prin of the Ed. not  
regard<sup>d</sup> of St. in the case of Speay v. Heathrop 1  
Day 20. It being a prin of Ed. that parol

parol agreements made at the time of 4<sup>th</sup>. a written  
writ. shall not say it but it shall be intended  
that the intention of the parties is embodied in  
the writings Nov 22. 1800 49. 12ay 23.

But the gent.  
will under the 4<sup>th</sup> requiring all agreements for the  
sale of lands or interest in them to be in writing  
admits of some exceptions.

and it may be laid down as a gen<sup>l</sup> proposition  
that parol agreements under this head are good  
notwithstanding if st. if they are morally consistent  
with the spirit & object of the st. <sup>& public good</sup> - for the st. causes  
no inherent invalidity in a parol writ. - but rais  
es a difficulty only in proving it by requiring the  
proof to be in writing. If then the agreement can be  
proved without danger of fraud or perjury, & consis  
tently with the mass of evidence, it may be said the  
agreement will be as good as any other.

1<sup>st</sup>. Then if one on  
a bill filed for the specific performance of such  
agreements, confesses it, as alleged, there can be no  
danger of fraud or perjury in proving it, it has  
therefore been repeatedly determined, that such ag  
reement or confession shall be enforced. 1 Wey 221. 441.  
2 R. 208. 344. 2 Atk 100. 155. 3 id 3. 1 Bl R 600. Ambley 556.  
2 Bro. Ch. 565. 6 Wey 37. 584. 1 Dow 271. 292. This rule is  
objected to but the current of the case supports it.  
Powell says, the st. is now satisfied for if agreement  
is now in writing, but this is absurd to say  
that deft in attempting to rebut & to accede



The Principle of Equity applies to it. But it has  
been questioned whether the authority can rest  
upon him & the spirit of the act.

1<sup>st</sup> It is agreed on all hands that if deft  
does not plead the St. having confessed the agree-  
ment he is bound by it. 2 Bro & 500. Peak 216.  
4 Ves. J. 23. Rob 158. 151.

2<sup>d</sup> It is also agreed that if deft hav-  
ing confessed the promise or agreement, submit  
(as deft in Equity often do) to such a decree as  
it shall think proper, performance will be  
enforced in due.

3<sup>d</sup> But it has been made a ques-  
tion whether if deft. having confessed the part  
agreement in his answer, & insists upon it  
St. of Graves &c. by plea, - the agreement can be en-  
forced against him. D. Hardwick decided that it could  
& his opinion is fortified by other high auc. Pr. Ch.  
208. 344. 345th 3, where Ld Ch. says down the rule in one  
direction, as above. - 24th 155 when deft actually plead  
the St. after confessing the agreement. - 2 Bro Ch 500.  
where L. Shuntou held a same opinion. 200 R  
600. where L. Mansfield lays down the rule un-  
conditional, that any agreement by part if  
confessed by deft is taken out of the St. There  
is a contrary decision at Law of C. B. 2 W Bl 63  
the case was. a bill had been filed in Ch. to compel  
a disclosure, deft confessed the agreement & plead  
the St. the plea was overruled & the case sent  
to the C. B. to have the damages assessed. - deft

deft insisted upon the St. & the Ct held. Lough-  
borough now Repetition C.J. that he was not bound  
notwithstanding his confession. Ch Brown Eyre  
held the same opinion 5 Wm 4 & 123. 2 Dm Ct.  
567-4.

The case before 2 S Thurlow  
& Bos & 559. was more solemnly determined & elab-  
orately argued than either of the others. & there  
he adopted the rule as above - he takes the ground  
that the St was not intended to render void pa-  
ravel agreements. But only to introduce a new rule  
of evidence his doctrine is, that the whole object of the  
St is to prevent the plff proving alibi i.e. by proof  
the paravel agreement. - & so when there is no comp-  
of fr & par. the aspect is good tho by proof. as  
in the case Ans. i.e. the case tho within the letter  
is not within the spirit of the act. - & this I  
think is correct. 5 Wm 4. Prob 160.

Now elementary writer I perceive that this  
as a qu. rex. - tho indeed Roberts says the weight  
of authority supports a rule that the deft confesses. he  
may still plead the St. - but this I doubt in  
the opinions of S Clements auc. 1 Poul 1204. Miff  
Ch 207. 211-2. Prob 160. 238. Peal & 215.

Now I confess it strikes me that it cannot be ma-  
terial whether deft pleads the St or not. He having  
confessed the agreement. - for the agreement being  
confessed by his answer. the agreement then appears  
upon the record - & then to this he annexes a plea  
of the St. & the agreement still appears confessed upon  
the record. Now if in the first case the con-  
fession



St. Pauls. Eccl. 1231 } confessor does not take it  
out of the St. how can it (sagut?) be enforced? - it  
is however agreed that a mean confessor does not  
take it out of the St. - if this is the case, then plead<sup>g</sup> the  
St cannot carry it back ag<sup>n</sup>. indeed the rule  
is after laid down, "that confessor" takes of sagut  
out of the St. and be negatory if plead<sup>g</sup> & bring  
it back ag<sup>n</sup>, the lib<sup>ty</sup> and supra is against in both cases.

1<sup>st</sup> It is a gen. exp. ag<sup>n</sup> whether a diff  
in Chan. on a bill for a specific performance of  
such parol agreement, is obliged to confess or  
deny it in his answer, or whether to make any  
answer at all. This case first arose in the  
time of Lord Mansfield, who decided y<sup>t</sup> diff<sup>s</sup> was  
obliged to confess or deny it in his answer. -  
2 Bro Ch 566. & Lord Thurlow was of the same opinion  
Maff M. & H. 2 contra Hob 156 & 160. 2 W. 155.

Lord Thurlow says the only effect of the St is to prevent  
plff from proving the oral agreement "aliunde"  
1 Kent 174. and this appears to me to be the cor-  
rect view of the St. so that if diff does not own  
the agreement plff can prove it only by written  
evidence & diff is not in danger of being cheated  
by the imposition of a false parol agreement. - But  
if St did not intend to protect diff ag<sup>n</sup> his  
own confessions.

The law upon this question stands thus. Lord  
Mansfield, Radcliffe Mansfield & Thurlow  
unanimously held that the confession took the  
case out of the St. & therefore that diff must

must either confess or deny. Lord Rosselin, & Lord  
Baron Egre & Lord Eldon expressed of contrary opinions -  
& Lord C. - In point of ancient & Hon. colls &  
Ship Justice appear to be balanced so that the  
question is now open to discussion upon  
principles.

The ground upon which  
these latter ancient are built appears to be  
false. They say, that compelling debt to confess or  
deny is inducing him to commit perjury -  
which is the object of the St. to prevent - The  
St. was made to prevent plff swearing agents  
upon debt by perjury & thus supporting fraud  
- it regarded not the debt & indeed, if he is put  
upon his oath in these cases, he has no  
greater an inducement to perjure himself  
than in the various other cases of daily ac-  
currences. Arg. this argument, of debt's induc-  
ement to commit perjury, might be ap-  
plied with equal force to his liability to an-  
swer to written agreements - If the rule contin-  
ued for by the opposite party is to prevail, it should  
be carried through & applied here. - but as said  
above the truth is, the St. contains plain fraud &c.  
only so far as it regards the introduction of it by  
debt plff.

This question depends much  
upon the former ones & my own opinion is in fa-  
vour of a affirmation of both of them. For if I will  
own, as all himself of the St. will, that he is com-  
pelled to confess or deny the agreement? And if the con-  
fession takes the case out of the St., then he should be



The Grand Jurors be compelled to confess or deny  
The matter of all this is, that upon the ground  
of mere law the rules are not settled & will  
not be suitable appeal is had to the House of  
Lords. But upon plain Law of opinion that  
the confession takes the case out of the Ld.  
and that case ought to be concluded in Equity  
to confess or deny in this case as in every other.

5<sup>th</sup> It has been  
observed above that parol agreement respecting  
the sales of land &c ought to be enforced in those  
cases, the circumstances of which were such, that  
there is no danger of fraud or injury. Upon  
this point it has been determined, that the purchase  
of lands at a vendue sale before a master in  
Chancery is binding, - the purchase being made in  
the presence of the officer of the Ct. - for the Ct.  
reposes confidence in its own officers. - This another  
instance to prove that the Ld. does not make  
parol contracts void, but only introduces a rule of  
evidence. 10th 214. 220. 1st 289. 1st 334. Prob 115.

Upon a similar  
point, a parol agreement between the solicitors  
of a party & mortgagee on a bill for foreclosure  
has been determined good. - for they as well as  
the Master in Chancery are under their oaths of office  
1st 334. Prob 115m.

6<sup>th</sup> And according to several opinions  
expressed by high auth. - & concerning whether  
it is necessary, a parol agreement respecting  
the

The sale of Lands &c. which is inferable from cir-  
cumstantial facts so that there can be no  
danger of injury in the proof of it may be  
enforced. Thus suppose A. agrees by parol to  
convey lands to B. by an absolute deed, as a mortgage  
now from the facts that the Vendor A. continued  
in poss<sup>n</sup>, sent a security to the Vendor to the a  
mount of the consid<sup>n</sup> instead of taking one  
himself from Vendor, paid the taxes, rendered  
no rent, but paid interest on his alleg<sup>d</sup> as  
security, &c. it will consid<sup>r</sup> the deed as given  
as a mortgage by parol agreement. - for these noto-  
rious facts, carry with them no danger of  
injury & make clear the opinion interest<sup>n</sup>  
of the parties, This is the opinion of La Salle  
Woodwiche, Powell & Woodeson, see Ballot 50.  
3 Moore 1429. 2 W & R 71. 2 Ves 376. Br 4526. -

There are other 4 cases  
which to the great rule, admitted on the ground that  
a promise to prevent fraud ought not to be con-  
sidered as to promote it - such a rule should be construed  
liberally, for the purpose of suppressing the mischief  
& furthering the remedy, &c.

It has been determined that when the non perfor-  
mance of the agreement would effect a greater fraud  
than a mere breach of it, it would be carried into  
effect notwithstanding the Stat. Prob 131-2. 1 Bl 600. 1  
Foll 171-2. 1 Pow 294 to 296.

Loia have agreed for the pur-  
chase of land to be performed or ~~not~~ performed on



St. Francis & Quincy on one side at the request of the  
the agents of the other - the latter will be com-  
pelled to perform on his side & on a parole de  
for 20 years being made, & by permission of Epw  
entered upon the land & began to build &c. upon  
a title lost for a specific performance &c. held  
that Epw & Co. were to a lease for an equal term  
of convey of title for a term specified - for here if  
Epw was allowed to violate the agreement & should  
become a sufferer. & he wd suffer in consequence  
of Epw's permission to enter upon the land &c.  
Now if Epw will lie by & see such proceed<sup>g</sup> he  
shall not afterwards be allowed to vacate & acquit  
be it and be bound. ut the Ct interfere to pre-  
vent it auct. 10 W. 211. 30th 100. 2 Wm 273. 619. 30 W. 437.  
7. 1134. 11th 788. 1 Foul 172.

Now it is very perceivable that if Epw was not  
compelled to make the lease - it wd be to suffer  
him to avail himself of his own fraud. &  
Ct 44. 91 Mod 37. 1 Br 561. 1 Br 417. 1 Br 398. 73.  
Poull indeed lays down another reason wch the  
agreement & ad. & enjoining. That when the act  
done furnishes presumptive evid<sup>ce</sup> that there  
was an agreement & thus diminishes the danger  
of perjury, But the consid<sup>n</sup> I presume never en-  
tered into the mind of the Ct decide the case, &  
indeed if it did it could amount to little or nothing  
as the terms of the agreement a left. perjury,  
as if nothing had been done 1 Pow 209.

Under this rule

that it has been decided that the delivery of possession  
of the land in pursuance of such special sale or  
lease is sufft. pt. & ac<sup>n</sup> on the part of vendor. And  
he may enforce it by agreement. - for in doing this he  
discharges himself of the use of the estate &c. 2 Vern  
263. 453. 2 Eq. Ca. 46. Stra 703. 3 Bro Ch 409. 6 Bro P.C. 111.  
Bro Ch 518. 7 Ves J. 747.

The payt. of the consideration con-  
vey on the a part of it by purchaser, has been  
held to be a sufft. part ac<sup>n</sup> on his side, to settle  
the case and of the pt. & ac<sup>n</sup> to be enforced & acquit  
age of vendor. But this has been doubted on  
the ground that the purchaser, on a lease  
may never back his money in case of  
of indef. ap<sup>t</sup>. - but the weight of authority is contrary  
see 2 L. 1 Ves 83. 222. 4 Ves J. 720. 1 Bat 64. 1 Pow 304.  
309. Prob 153 to 155. contra 2 Eq. Ca. 46. 9 Ves J. 234.  
Lugden 74 to 81. Com. C. 82.

The payt. of earnest money  
however is not such a part performance as  
will take the lease out of the pt. - for it  
is not a pt. of the performance of a contract  
but a pt. of the contract itself, & the payt. of a  
small sum as is usually of use is nothing  
more than a mere solemnity or form of attes-  
tation, like that of shaking hands upon a  
 bargain Str Ch 503. 1 Bond 175.

Mr Powell remarks upon this case that con-  
tract being paid an ac<sup>n</sup> of law may be made  
sine & damages recovered for the breach of a contract.



Mr. Paulky, but he cites no case, for the reason  
I suppose that he can find none. But the As-  
sessor is not bound upon him for if damages  
exist to this land owned, the same must be  
out of the tax - which is not the case - I pre-  
sume the truth is this merely, that earnest  
ling J. B. on refusal of the rent<sup>g</sup> is compelled to  
agree to some other recovery such as earnest  
ly or as a final apt. - If then this ar<sup>n</sup> would  
operate as a disaffirmance of the agreement  
his B. & D. v. 308. -

As to the pay<sup>t</sup>. of money it has  
been questioned by some whether the receipt  
of it or a proof of it by way of st. paper<sup>s</sup> or  
of bank agreement id. <sup>and</sup> proved by parol.  
It wd be strange that the rule should prevail  
that if pay<sup>t</sup>. of money is a st. paper<sup>s</sup> if the  
receipt of it comes to be proved by parol. for  
if a gent receipt is given for so much money  
it wd have no bearing upon the terms  
of the contract - And if the receipt given  
is proven true as to the terms of agreement  
there then wd be a note or mem<sup>o</sup>. of pt. agree<sup>d</sup>  
in writing - To require this wd be to consider  
the rule above negatory 1 Par 30<sup>th</sup> B. Ch. 83-4.  
Ed. Howard he says it may be proved  
by parol. and indeed it is a fact, as much  
as to be proved by parol as a battery or a mu-  
der. 30<sup>th</sup> 4.

Next to State a parcel agreement

out of the act the act done in part but, however,  
must be such as not cause prejudice to the  
party claiming under the agreement. - if the agree-  
ment be not performed, alias it will not  
leave him in statu quo - as the fraud aris-  
ing from the non-performance is so greater  
than that which would arise out of a mere breach  
Thus, a parcel sale is made of lands, & purchaser  
pays the consid<sup>n</sup>. - if he afterwards  
chooses to rescind the bargain vendor cannot  
compell performance - for he (Vendor) has done  
nothing whereby he will be injured by a non-  
perform<sup>t</sup>. - But purchaser has a right to enforce it  
for he has paid his money and will be inj<sup>d</sup>.  
12 C. & F. 45. 4 M. & G. 341 Prob. 188. 162.

It is also require  
d that the act claimed to have been done  
in part performance should be such as in  
view of the act would not have been done but  
with reference to the agreement. - indeed if  
one of the parties has done an act which he would  
have done as well without regard to the  
agreement as with regard to it, the act will not  
consider it as a part performance. Case, of a lease  
who had made an agreement to renew his lease  
holds over - now altho the lease is in possession still  
as it is an usual thing for a lease to hold over,  
the not having taken possession de novo, it is still  
more considered as part performance. It is an  
extra case in which the Vendor had entered &



Chancery & common law. 1 Thos 304.  
3 Inst 4. 12th 1166. 1 Br Ch 501. 1 Br Ch 412. 3 Vez 357.  
12th 112.

It is said above that the duty of prop  
by ren or brende was suff. post-performance  
on the pt. of W, but merely giving directions for  
the making of the deeds of conveyance, or viewing the  
estate, & showing a surveying, or ascertaining the  
boundaries of it is not regarded as pl prop.  
In that one merely acts introductory con-  
ciliatory to the conveyance, & not acts done in per-  
formance of the agreement. 6 Bro P.C. 43. 1 Bow &  
212. 12th 1166. 1 Br Ch 175. 3 Vez 354. 379. 6th 41.

In case  
of marriage settl<sup>t</sup> agree<sup>d</sup> the marriage of W  
parties is not of itself considered as a prouther  
formance as between the parties but only  
the very terms of such contract. They are not to  
take effect, unless if mar is celebrated. so that  
if mar is not celebrated as a pl prop. every can  
not be taken out of it. 1 Br Ch 501. 1 Thos 304.  
1 Br Ch 175. 12th 1166 to 1198. 1 Bow 309.

But it is said a  
part agreement made in consid<sup>n</sup> of mar by  
a 2<sup>d</sup> person as a father is taken out of it  
by mar, provided mar takes place  
with his consent, thus if father of intended hus  
agrees by part to make a sett<sup>t</sup> upon the  
wife. she may after mar maintain an  
act<sup>n</sup> ag<sup>t</sup> him for it. otherwise there would be a

a fraud practiced upon the parties to the mar.  
2 Vern 273. 1 Dow 297 & 304. There is a case 1 Vez 299.  
w. Temple birth in minor & illegible. It was agreed  
that wife shd receive the avails of a certain fund  
to her own use during coverture, & then with power  
to dispose of it by will - the agreement was by parol  
this was held good as the plea of pt. perjury is  
on the 5 rule above. That the parol proof of one  
side gives no right to the other to impose & acquit.  
1 Vez 297. 1 Dow 304.

And it has been decided that the  
cutting down timber trees & clearing land for  
purpose of build<sup>g</sup> in pursuance of a marriage  
agreement, was a sufft. pt. perjury. - See & agreement  
was enforced. 2 Eq. Cas 29. 1 Dow 304.

In Con. on the quest.  
of money being paid, being a part perjury we  
have had as many diff<sup>t</sup> decisions as the case  
admits of. By the two last cases the pay of  
money & doing some other act has been held to  
take the case out of the Act. 2 Day 225.

Upon the same  
quest. point, the plaintiff proved a deed or any other  
instrument for the conveyance of land or other subject may  
be rebutted by proof of a parol agreement, when  
such proof furnishes evide<sup>ce</sup> of fraud in the  
exec<sup>n</sup> of the instrument, for the signing seal.  
& delivery may be proved by parol, therefore  
may the rec<sup>d</sup> of a deed be thus proved, thus  
when there was an agreement between A. & B.





1 B.R. 275. 8 il 327, 2 B.R. 1249. Mills 24. 1 B.R. 2.  
235. Exp D 20. 165.

In Con we have no such ~~to~~ but our ~~to~~  
have adopted the Eng rule 4 Day 226.  
This we you perceive does not regard con-  
tracts for the "sale of lands or any interest  
in them" &c. but for the recovery of rent  
alone,  
Bye the by as a L. an act of assumption  
not lie for rent in any case whether  
the lease was by bond or deed - but ~~not~~  
not lie; I never ed answer sufficient  
appt not lie, the only one a pigrid is  
that debt is a higher remedy & therefore  
left at account to it to recover his debt, but  
here ag? I can not see a reason for this, as  
appt is the most effectual remedy known  
to the Law Art 34. Code 284. Exp D 42. Exp  
D 546. 414. 3 M Code 152. Code 197. Peak 8241. 2 Com.  
C 509. Exp D 20.

The Fifth. Clause of agreements con-  
templated by the Statute in those which are  
not to be performed within one year from  
the time of making them i.e. bond testifying  
is not admissible under the Statute to prove in  
court not to be performed within a year. As  
of the prom. to to pay money or do an act  
in fifteen months, it could be enforced if  
it is in writing



*1. The clause of 4th is not an agreement*

*in construction of*

this clause of 4th is not an agreement, nor is it intended to be an agreement, respecting land & other matters. - The reason of this is I suppose, that the preceding clause has made all the provisions intended to be made concerning 4th - for under that clause, they in genl. are of no effect when accorded. & their terms they are to be performed within the year if they are not in writing. 1 Vern 159. 250. 327. 2 Paw 276.

But when according to the terms of the parol agreement the performance is to take effect upon some contingency, which may or may not happen within a year - it is not within the 4th, as a prom. to pay \$100. on the return of a ship from India - good if by parol. - 2 Sal 280. 250. 280. 3 Bur 1278. 250. 505. 2 Sal 9. 2 Ray 316. 673. 2 Ark 824. -

Upon the same ground a parol promise by A. to pay a sum of money to B. on his marriage, or to have him B. a sum of money upon his own (ist) death, - not within 4th but within the 3rd. That if the terms of the agreement are such, as may by possibility or at any rate, require performance within the year, tho' it be not actually required, the agreement is not within the 4th, it is an agreement.

And to make a contract dependent upon a contingency, tho' it is not actually it happen within the year, for it must be pending or





St. Louis v. Mich. Ind. Co. Agreements, that in the construction of this St., is the same with Law as in Eng<sup>l</sup> as is the case with all other St. & contracts. - The remedy or relief however may be diff<sup>r</sup> & generally is. 1 Foul 22. 3 Bb 431.

The ~~first~~ <sup>question</sup> is  
What is meant by agreement in writing and  
Notes & memoranda in writing.

From the decision  
on this subject it is inferable that any writing intended to furnish evidence of the agreement is a note or mem<sup>o</sup> in writing with in the St. Whence it is that a letter written by one of the parties & containing an acknowledgment of the terms of the agreement is as held to be a suff. note &c. - This however cannot in strictness be called a written agreement, but it is a note &c in writing. 1 Foul 179. 2 Bb. C. 32  
3 Bb. 315. 3 Bb. 503. 1 Wm 201. 2 Bb. 322.

When there is such note &c in writing it may be made certain by reference to other documents even to extrinsic facts, but the note &c must actually refer to these other documents or facts. Thus, if A agrees in writing to convey to B. a lot described in a particular deed or record. although the agreement is uncertain without that deed or record, still with it, it is made certain in law. Or, if A agrees in writing

mitting to convey to B. a lot of land for the same price J. gave for it, here the appeal must be had to the fact, by *visu* alunde, to ascertain the agreement certain 3 Bro. C. 318. 1044 J. 330. 2 B. & A. 238. Rob 107. 115.

But when a written agreement is uncertain refers to something extrinsic by which it is to be made certain, if it is not made suff. certain by such references, no parole *visu* can be admitted to make it more so. e.g. A agrees to convey to B a tract of land described in a particular instrument, which when referred to is found to contain no description of land the party claimed under of agreement cannot now refer to other evidence to determine what was meant, for agreement is void from uncertainty. 1. 243. 326. Rob 108m.

An Advertisement either printed or written by one of the parties, containing the terms of a proposed agreement is a suff. *notu* or *mem.* in *visu*. Thus if A. ad. advertisement that on such a day he will make a conveyance of a certain tract of land, to the man who will pay him \$100. Now if B. ad. pay him the money, he, the advertiser, will support his ad. for the conveyance. 3 Bro. 599. 3 Bur 192. 14. But such advert. must like every other instrument be proved to be the ad. of debt by collateral evidence.

And it is a principle in the construction of the 4th Statute



Re. D. Misset. Chancery the conside<sup>r</sup> as well as the  
known, it self must appear in the writing  
- This rule is founded on the construction given  
the word "agreement", it being held to include  
what ever enters into the contract on both  
sides 8 East 11. 6 Al 307. Rob 16. 207.

There is an sabb<sup>th</sup>  
to this rule, in the construction of the 6<sup>th</sup> clause  
of the Statute relating to the sale of goods of  
10 value & upwards,, It has been decided that  
in agreement in writing of clause if conside<sup>r</sup> need not  
appear in the writing but may be proved by  
parol - This is founded on the diff<sup>er</sup> of the  
ology of this clause & of others, in the other the  
word used are, "any agreement or note &c" but  
in this, "then shall be some note &c" note used.  
The word "agreement" 8 East 307. Rob 117.

an Instrument  
in the form of a deed & intended to operate  
as such, but failing of such operation from  
of omission of some requisites or changing  
the relative situation of the parties, may  
be considered in Equity as an agreement in writing or  
evid<sup>ence</sup> of an agreement in writing within the Statute & so  
be enforced, thus if a man under of 21 & of law, agree  
to convey by deed, but execute it with but one  
witness instead of two, or without an acknow-  
ledgment. Now if deed this not suff<sup>ice</sup> to con-  
vey of title, but it will consider it as above -  
Or a bond given by a woman to her husband.





~~The instrument~~ in which his name was written  
in his own hand - he must be a suff. sign.  
10 R. 741. 1 Pow 285. 1 Fonbl 166. 7.

There was indeed formerly a great  
deal of looseness in the construction of  
the word "signing", & it was held that the  
party having made an alteration in his  
own hand writing, in a written draft  
was suff. - but this is now overruled, 1  
Vern 220. 1 Fonbl 165. 6. 1 R. 740. 1 Pow 284.

One signa-  
ture as a subscribing witness - & knowing &  
contents of the instrument is a suff. sign.  
to bind him to any stipulation in & in  
on his part. Can of a mar. sett. it being re-  
cited in the inst. that the mother shd pay  
£1000. - & she knows & contents, sign? the  
inst. as a witness - & was held liable for  
it £1000. 1 Wils 316. 1 Wyl 6. 1 Pow 284. Now in suff.  
part of you it is to be observed, that the mother  
by her signature intended to give authentic-  
ity to the inst. If to this it is answered, the  
agreement was between other parties, & suff.  
she must be considered as adopting the stip-  
ulations in it on her part. & she is bound to pay -

Who must sign

It will be suff. if the agreement be signed alone  
by the party, against whom the remedy is sought  
if there is evidence of the acquiescence in or  
acceptance of it by the other party. -  
this

that when it drew an agreement to procure  
B. to sign it, but did not <sup>sign</sup> it himself.  
- in a suit agt B. it was decided that the  
signature was sufft. to bind him 1000 C 564. 9 Vez.  
for 500. 2 Wernz, 3. 1 Eg. Ca 20. 2 ib 32. 3 Vez. 265.

It has been said in this case  
case that W. was also bound, tho he did not  
sign of agent. But, the reasoning is wholly  
unsatisfactory to me. Still if the party  
does sign (or) brings a bill for a specific sum  
for agt B., the Ct. will not interfere in  
his favour - until he has performed his  
part, for the agent's bill actually appears  
as agent, 1 Vez. 82. 2 ib 124. That W. is bound see  
1000 C 569. 1 Eg. Ca 21.

It is laid down as a rule in  
genl. terms, that if an auctioneer subscribes  
the name of the highest bidder to the cond<sup>n</sup>  
of sale, it is a sufft. signature - for the auction-  
eer acts as agent for both parties. -  
1000 C 599. 3 Obur 1941. B. M. H. 286.

But the rule in its genl. form  
has been since modified & B. M. 151. But here  
it is sufft. under the <sup>the</sup> clause of 1 Eng. 4.  
which relates to sale of goods of 1000 & upwards.  
But this has been questioned in Ch. see one  
limiting power to tax clause of 1 Eng. 4.  
1000 C 103. 4 W. 300. 1 Vez. 344. - see 1<sup>st</sup> rule of 249  
so that the question is not finally settled.

It has indeed been doubted



~~It is said~~ ~~this all?~~ ~~But~~ ~~?~~ doubted whether sale  
at auction any case were within the Act.  
because it is said the sale is public, &  
every thing is done so publicly, that there  
is no danger of paying, but then doubts  
do not seem to be well supported by auc-  
tioner Ben Brettell it upon any rule of  
construction - as at these sales there  
is usually a great deal of confusion etc.  
App 800. 3 Nov 1921. App 250.

A printed signature  
may be as effectual as any other, & thus,  
when a trader gave out printed bills of  
parcel with his name printed upon them  
it was held a sufficient signing, but in such  
case it must be proved that it was given  
as his signature, - for it is not enough a  
man should always write his own name  
to make it his signature - it may be  
done by another, 2 B & P 238. Prob 124.

When a writing  
is signed by an agent, it is not enough  
that he should be named by deed or writing  
he may be empowered by parole. - In a  
St. only a person the agent, or note to be in  
writing - but here the auc. is by  
not a signature made to the Ed. 3 Moore 427.  
9 Vez. 425. Vin & Bon. 415.

It is not necessary  
identical words or agent in question & it

not to be signed at all, It is sufficient if there is  
an agent, a note of it, in writing & that note  
& acknowledged & another signed as in case  
of a letter acknowledged the terms of agreement  
the letter being signed by Bro. E. B. 18. 3rd 503.  
Feb 121. Indeed this point was decided in a  
case in which a letter was written by the  
party to his own agent.

There is nothing in  
agreement by ones own hand does not dis-  
cuss with the necessity of sign? - for the  
It requires not only that the agreement be  
written but also that it be signed - tho'  
the idea once formed, that no man was  
required other than that it be written by the  
party charged 100 770. Feb 121.

### Of the consideration of contracts.

A contract  
is defined to be an agreement between two or more  
parties upon mutual consideration, accordg. to this defi-  
nition of the essence of what the C. L. deems a  
contract that it should be founded upon what C. L.  
deems a consid<sup>n</sup>. This consid<sup>n</sup> is the ma-  
terial cause of the contract or undertaking or  
that on account of which each party is induced  
to give his assent to the agreement & go a contract  
to deliver goods. - the consid<sup>n</sup> is the price agreed  
to be paid for them, or in essence, the agreement  
to pay is on the consid<sup>n</sup> of the goods being to be delivered.



Consideration { delivered 2 Bl 443. 1 Pow 30.

The consid<sup>n</sup>

known to the C.L. are of two kinds, viz good & valuable

A good consid<sup>n</sup> is that of kindred, earnest affection between near relations, as 2 Bl 297. 444. in case of father making a conveyance to his son, in consid<sup>n</sup> of mat<sup>l</sup> affection, as contrasted distinguished from valuable. And such a conveyance is good as between the parties to it. And it is not so as ag<sup>t</sup> creditors or bona fide purchasers for a val. consid<sup>n</sup> - So if a father makes a conveyance to his son, he does not hold ag<sup>t</sup> his father's creditors - Or if the father afterwards convey it to bona fide purchaser the purchaser will exclude the son & Bl 297. in plus, Fraud<sup>n</sup> convey<sup>n</sup>.

And an. & a. courts founded on such consid<sup>n</sup> may in many cases be enforced in Ch. I say in "many cases" for as the interpretation of Ch is in a great measure discretionary, no precise rule can be laid down 1 Vern 427. 2 Pw 375.

Valuable

consideration is one which consists of something possessing pecuniary value, as, money, goods real estate, labour performed, or marriage. In this last is always consid<sup>n</sup> as a val. consid<sup>n</sup>. & not on<sup>ly</sup> <sup>but</sup> on the foot<sup>g</sup> of mat<sup>l</sup> affection 3 Co 53.

Upon this principle, the consideration becoming my surety for a debt owed, as it procures or belongs, credit to me, is divided to be valuable in Law. Bar 452.

Under this head of the subject of contracts it becomes necessary to consider the two divisions of contracts known to the L. v. viz.

Simple & Special

contracts, for at L. all contracts are either simple or special 4 D. 351.

A special contract is one which is made by specialty i. e. by a deed or writing under seal, or is evidenced by a specialty or the legal solemnity of sealing.

A simple

contract on the other hand, is one which is made by parole, or a writing not sealed. It is then the seal or the want of it which produces the distinction; so that when in writing without seal, it is at L. precisely like a parole contract. & in point of solemnity is upon the same footing with it. Indeed in strictness a writing not sealed is not considered, is not considered as an instrument which of itself constitutes a contract, but only evidence of a parole contract. & so is it considered by all the rules of pleading. It is declared upon as a parole promise without making proof of it, & is given in as evidence



Considered & valid at the trial, but when  
an act is left upon a specialty, the effect  
of it must be made 4 R.R. 351 n. 2 Bl 465-6.  
Prob. S. R. 94.

In our written instruments containing  
express promises or covenants are in genl treated as  
specialties, & the Eng law relating to specialties ap-  
plies to them, there has been a great deal of specu-  
lation among the profession to determine how  
far this rule extends for it certainly does not  
extend to bills of exchange or negotiable notes.  
but an old fashioned prom. note is no consid.  
as a specialty - we suppose a note from the  
form of the du<sup>n</sup> we declare in case, founded  
upon if in the act upon a specialty & makes  
perfect of it - see 1 Swift 373.

And yet, when the  
act is clearly not binding unless it is upon con-  
sideration, such a contract is what is termed a nudum  
factum, & no contract applies. ex m<sup>o</sup> p<sup>o</sup> t<sup>o</sup> mor  
within act; thus, if I agree to deliver £10 to  
A, gratuitously, I am not bound by it, no  
relation notwithstanding, unless the law  
considers a vol. consid<sup>n</sup> - for tho, a prom. note  
without consid<sup>n</sup> is morally as binding as any  
other, still it is not so far obligatory that the  
Court Law will take notice of it if that  
species of contract the law deems imperfect  
alleg<sup>n</sup> & Court Law never enforces. 2 R.R. 445.  
Sal 119. Plow 302. 309. 1 Doull 325. 333. 5 R. 143.

Consider } There has however been some looseness  
of argument & some confusion occasioned on  
this subject by the arguments used in the MS.  
in the case of Pollons vs. Jan Microph in which Mr. J.  
Wilmer observed & the observation was since  
repeated by 8 other judges, that a court in  
writing the not made, and he held at 8 L. the  
without consid<sup>n</sup> of Burr 1670. 2 Bl 446. But the  
proposition in its extent is not supportable  
- it is too broad. - The mere reduction of a  
court in writing will not dispense  
with the <sup>necessity of</sup> consid<sup>n</sup>. The position of J. Wilmer  
is supported by 9 cases of J. Blackstone, but  
the case he quotes to the position will not  
support him, it is the case of a person's note  
now & consid<sup>n</sup> of a person. one may be inquired  
into as to his & parties to it. - but if that  
note be negotiable & negotiated - the person con-  
not in good use & want of consid<sup>n</sup> nor is  
it holder obliged to prove it. but this is found  
to be, on the great principle of Ex. Priv. - & negotia-  
bility, & therefore merely an exception to the  
general rule of J. B. L. 751. 141. 351. this B. 155. 3  
Bl. 421. 751. 1 Foll. 235. 1 Pow 341. 2 Co. 42. 2 Bl 71. then  
we will be found to support my position. &  
indeed in such cases & in judge of law, a consid<sup>n</sup>  
is necessary in every writ. & special or simple, in  
case of a simple bill, or a penal bond, the plaintiff  
need not prove of consid<sup>n</sup> by writ. & c. & c. & c. & c.  
and I kept away the worst of it, but neither



Consideration } neither of these cases will establish  
the proposition alone, for the reason why Stiff  
is not obliged to prove consideration is q<sup>d</sup> from the  
enquiry of the instrument the law implies  
one - & for the same reason the deft is estopped  
to aver the want of it. That of solenm<sup>y</sup> of the  
instr<sup>t</sup> implies a consider<sup>n</sup> see Vern 514. & Bur 163  
1 Poul. 339. 4. & Wals 46. 1 Pow 232. 3. That deft is es-  
topped to aver of contra & Ch 295. & Ray 429. 1550. 1 Pow  
344. & 385.

The result of these observations is merely q<sup>d</sup>  
of in princ<sup>ip</sup> of consider<sup>n</sup> is at all, ne-  
cessary to the validity of every contr<sup>t</sup> whether  
special or imple, but it is usually tending enough  
the want of consider<sup>n</sup> appear on the face of  
the contr<sup>t</sup> or on some other circumst<sup>ances</sup> that  
is part of it. Prot. F. B. 95.

But the rule that  
consider<sup>n</sup> is necess<sup>ary</sup> for every contr<sup>t</sup> applies  
in its fullest extent to all contr<sup>t</sup> only. &  
in q<sup>ue</sup> this imports no more than that  
where there is no consider<sup>n</sup> the law will  
not enforce of contr<sup>t</sup> - if then the contr<sup>t</sup> be  
carried into effect already i. e. acc<sup>ord</sup> to the par-  
ties themselves, as by mutually delivering of  
subject contracted about, the law will not  
vacate it for want of consider<sup>n</sup>, but will leave  
the parties in statu quo. So that if I promise  
to make a gift I am not bound by it but  
if I make the gift, the law then will not

not enforce rescind it as while ex<sup>er</sup> it and  
not enforce it Long 20.21. Sta 955. 1 Ba 238  
Esp 2577

How a consideration may arise.

It has been  
said a consid<sup>n</sup> can accrue or arise only in  
one of two ways. 1<sup>st</sup> from something ad-  
vantagous to prom<sup>r</sup> or party by whom the  
undertaking is to be done. & 2<sup>d</sup> from some-  
thing disadvantageous to promisee or party  
in whose favour the undertaking is  
made. 1 Full 936. Cowd 290. 294. But this rule  
is too narrow tho it is good as far as it  
goes. —

In illustration. 1<sup>st</sup> It is an agreed point  
that a consid<sup>n</sup> may arise from something  
advantageous to prom<sup>r</sup>. Thus in consid<sup>n</sup> of  
goods delivered by A. to B. B. promises to pay  
a certain sum at a future time. Here is an  
advantage to the prom<sup>r</sup> (B) — & the C. & L. does  
not regard the quantum of consid<sup>n</sup> (I speak  
of the essentials of a consid<sup>n</sup>.) it does not regard the  
proportion of advantage — it is suff<sup>ic</sup> if there  
is any consid<sup>n</sup> or advantage, as a pepper corn  
has been held to be of some value & suff<sup>ic</sup> consid<sup>n</sup>  
but a mark is of no value. 1 Wils 290. 1 Reg 518.  
2 Vern 213. 2 Pow 152.

All insignificant consid<sup>n</sup>  
are in law deemed no consid<sup>n</sup> at all, as to  
pay a sum of money on consid<sup>n</sup> of ones not laughing



Consideration in 24 hours, a writing in 30 seconds &  
2d. 23. 2d. 206. 2d. 294. 1d. 355.

But any thing how-  
ever trifling it be done by him to whom the  
promise is made is said to be suff. Thus  
when A. leased to B. who assigned to C.  
A. promised C. that if he wd. shew him  
the lease he wd. pay the rent in arrears  
now altho' assignee (C.) was obliged to pay  
the rent in arrears still the lease having been  
shewn to him, the Ct. held an ass. on the  
prom. and th. the consid. being suff. 2d. 150.  
2d. 270. 2d. 294. 1d. 343.

And it was de-  
cided in one case that the mere relation of  
Landlord & tenant was a suff. consid. for a  
prom. Case in wh. I det. stated that A. was  
his tenant, in consid. whereof he promised to  
carry away certain straw &c. from his barn  
5d. 273.

2<sup>d</sup>. Consideration may arise from some-  
thing not was disadvantageous to the per-  
son or party in whose favour it undertaken  
was made. Thus when A. delivered up a  
bond agt. B. to be cancelled, on a prom. from C.  
to pay a certain sum, now here there is no  
advantage accruing to C. but a disadvantage ac-  
cruing to A. - And of consid. was held to be suff.  
When it is said the consid. must be dis-  
advantageous to prom. it is not meant that

that the whole performance, i.e. taking the  
consideration on the one hand & the promise on  
the other, the result shd prove disadvan-  
talous to prom<sup>ee</sup>, for in such case the  
consideration wd be suff<sup>t</sup> only when the prom<sup>ee</sup>  
makes a bad bargain. But the consid<sup>n</sup>  
alone shd in its nature be disad<sup>t</sup> to prom<sup>ee</sup>  
as in the case above if the prom is fulfilled  
prom<sup>ee</sup> will not suffer. but if it is not fulfilled  
he will suffer, - & consid<sup>n</sup> is in its nat<sup>n</sup> &c. *Ever*  
11.5. Bro J 242. Bro E 744, 5, or 745. 849, 881. Cow 128.  
Hob 216.

As a consequence of the rule that a suffi-  
cient consideration is required, only in one of two ways  
viz prom<sup>ee</sup> is being disad<sup>t</sup> to prom<sup>ee</sup> or advant<sup>t</sup> to  
prom<sup>ee</sup> it is established, That a contract is not sup-  
ported by a consideration altogether past & executed. Thus  
if having formerly bailed my debt<sup>r</sup> when arrested I promise to pay him a certain  
sum, now there is no obligation whatever, the  
prom<sup>ee</sup> is subject to the act. there is no present  
debt or duty, & no future advant<sup>t</sup> to prom<sup>ee</sup> or  
disad<sup>t</sup> to prom<sup>ee</sup> - the prom<sup>ee</sup> not being the in-  
ducement to bail my debt<sup>r</sup>. - But if I had  
made the prom<sup>ee</sup> before he bailed &c. it wd have  
bound me. Or as if I suppose I do for me  
some gratuitous act, as build a house, & I  
afterwards promise to pay him - the consid<sup>n</sup> being  
past & ex<sup>ec</sup> will not bind me (Dowd 302.  
Bro E 741, 885. 2 Bulst 73. 1 Roll 11.



Consideration } But when the consid<sup>n</sup> is  
not altogether past & ex<sup>er</sup>., the ex<sup>er</sup>. in  
part it is suff<sup>t</sup>. Thus, when a lessor in  
consid<sup>n</sup> of lessee's having occupied the land &  
paid & rent promised to save him harmless  
of all claims ag<sup>t</sup> his future poss<sup>n</sup> - the con-  
sid<sup>n</sup> was held good, because it is not altogether  
past, he being to continue in poss<sup>n</sup>.  
& payment in future, wh<sup>ch</sup> probably is a  
moving cause of the promise, Bro 894. Bro  
8409. 2 Bulst 43. 3 Cal 96.

But the rule supra, that a  
consid<sup>n</sup> past & ex<sup>er</sup>ed will not support a  
prom. is too narrow, for such a consid<sup>n</sup>  
is good if there was a prior legal duty in-  
cumbent on prom<sup>t</sup>. Thus, when a prom<sup>t</sup>  
B to pay the expenses he had incurred in bury<sup>g</sup>  
his child - the prom was held good, altho the  
expenses were paid - (ex<sup>er</sup>.) - for by 24 Eliz. parents  
are required to bury their child<sup>n</sup>. 1 Dow 413. 1 Leon  
196. Ray 260. Bro 838. 3 Bur 1671.

So if there was a  
prior moral obligation it will be suff<sup>t</sup> to  
support a prom, & take it out of 2 gent rule.  
as, a prom to pay a just debt barred by 2  
L<sup>th</sup> Sim<sup>n</sup> is bind<sup>g</sup>. - for the debtor is doubtless  
under a moral oblig<sup>n</sup> to pay the debt. 1 Doubl  
336. Ray 259. 2 Bl 445. Bow 290. 294. Bro 147. 1 Pow 351.

Upon the same  
prin., a prom. by a putative father to pay for

for the nursing of his natural child, was held  
to be limited. - 3 East 906.

And a consid<sup>n</sup> part will  
support a consid<sup>n</sup> if the consid<sup>n</sup> originally accrued  
at the request of prom<sup>r</sup>. for here the act<sup>n</sup> to  
promise couples itself with the previous  
request by legal relation & as it is effect-  
as if made at the time of the request.  
Thus if A. prom. to pay B. in consid<sup>n</sup> that  
some time before had at A's request sold  
his land servant, - H. Parn good. 2 West 258.  
3 Lat 96. Rob 105. Cro J 18. Car. E. 42. 282. 409. 1 Donl  
396.

It has been determined that, a meritorious  
act done by one, is not a suff<sup>t</sup> consid<sup>n</sup> to  
support a promise in favour of another  
is an act cannot be supported upon it by the 3<sup>d</sup>  
person, it must be bro<sup>t</sup> by the person to whom  
the promise is made. Cro 988. 2 Rol 441. 597. West  
6. 88. 200. Chit. B. 220.

This rule has been much relaxed in mod-  
ern times & seems now to be limited to  
deeds & written instruments inter partes  
Thus, if A. covenants with B. to pay a sum  
of money to C. & A. delivers the deed to B. the  
case comes within the rule, so that the act<sup>n</sup>  
must be bro<sup>t</sup> in the name of C. 3 B & P 148m  
3 Lev 139. 1 Lev 235. Cro 77. Car 872. - The rule exists  
in a great variety of cases 1 B & P 101. 2. Cow 440. 30 M  
35. 6. 5 Burr 2580. 1 ER 659.



Condition } The general rule applies in the last case  
because where there is a deed with imports to be  
between two persons the solemnity of it is too  
great, to allow of a 3<sup>d</sup> person's maintaining an  
a<sup>c</sup><sup>n</sup> upon it. But in case of parcel against  
it is settled by the late case. That the 3<sup>d</sup> person or  
person to be benefited, may maintain an a<sup>c</sup><sup>n</sup>  
upon it 3 P. W. 146 m. 1 Ch. 207. 2. Com. 219. 25 Mod. 149. -  
1 Johns. 140.

Notwithstanding the numerous cases that  
have been adverted to, there has been very little  
reasoning upon the subject - but they have  
been decided for the most part upon a<sup>c</sup><sup>n</sup>.  
The principle I should say governs them - & allows  
of a party to sue, in that the party adopts & ant-  
icipates the contract by his subsequent assent. It  
is precisely the same as the case of a man be-  
coming bound by a contract made by an unau-  
thorized person, & he afterwards assents to.  
But in the case of an instrument specially being  
given, the instr<sup>t</sup> imports to be between A & B.  
& C. cannot in concept of its solemnity sue  
upon it. But when the contract is by parcel, &  
from & to in the suit upon it is laid to  
have been made to himself - & the proof  
of the promise to another to pay to self will  
support the declaration 10 P. W. 101.

But notwithstanding the contrary of opin-  
ion which has prevailed upon this distinction  
it has always been agreed, that a convenient

consideration moving from one person, will support a promise made to a second for the benefit of a third, when the third is nearly related to the second person. Thus a promise from A to B. to pay a sum of money to B's daughter if he (B.) and even A of a complaint was held good. & the action may be maintained by the daughter - but if this promise, is in favour of a stranger - the case was held to be diff. - This making a distinction when the law makes no diff. for, for the spirit, of both cases is the same. - Thus it will be seen by the auct. that such promises are now good, if made in favour of a stranger & he may maintain an action upon it in his own name. 1 Vent 318. 332. 2 Lev 210. Chay 302. 1 Pow 353.

When a promise is made in consideration of forbearance of a suit, two requisites are necessary to the sufficiency of the consideration. 1<sup>st</sup> The forbearance must be perpetual i.e. never to sue, or for a fixed term as a year or six months. 2<sup>d</sup> It must be of an act in which the promisor is chargeable or at least has a colourable liability. Bro Elg 206. Dep. D. 95. 1 Pow 359. 4.

1<sup>st</sup> Hence a promise to pay a debt in consideration of forbearance to sue - no time of forbearance being fixed - or no stipulation that it shall be perpetual is not binding - but the promise, considered of forbearance for a year or even for an unreasonable time, is binding - for as to the latter, by 11 & 12 Geo. 4 will



Consid<sup>n</sup> will answ<sup>r</sup> to circumstances of each  
case determine what is a reasonable time  
8 ad 819. 455. Mart. 1095. Exp. 245. 1 Dow 353. 4. The na-  
ture of this decision is, that when the time  
is not fixed, it leaves it to the discretion  
of prom<sup>ee</sup> to sue when he pleases. - The consid<sup>n</sup>  
is altogether frivolous, for he may sue  
an hour after if prom is made as well as  
a year.

2<sup>d</sup> The forbearance must be of an act<sup>n</sup>  
in which the prom<sup>ee</sup> is liable or at least has  
a colourable liability

Hence a prom. made by a mother to pay a  
debt due from her son who was dead. prom<sup>ee</sup>'s  
act<sup>n</sup> not to sue in a given time, was  
held not to be allegatory the consid<sup>n</sup> not being  
suff<sup>t</sup> - for the forbearance of the suit was  
no favour to her - she not being liable, no  
disadvantage to prom<sup>ee</sup>, & no moral  
obligation. Or as if a prom by A to pay to B a  
sum of money in consid<sup>n</sup> of his forbear<sup>g</sup> a suit  
ag<sup>t</sup> him for a debt due from another. Mart 73.  
3 Dal 96. 1 Dow 354. 5.

Upon a similar <sup>principle</sup> if one arrested on a false pro-  
mise in consid<sup>n</sup> of his being discharged, promises  
to pay a sum of money, the prom will not  
bind him, for there is no consid<sup>n</sup>. for he is en-  
titled to his discharge if evan<sup>ce</sup> being unlaugh<sup>t</sup>  
discovered false in pri<sup>st</sup>. to detain him even for  
a moment. 8 ad 244. Mart 73.

But where there is a colour of  
a liability in the party sued, a prom. in consid.  
of forbear. of a suit is bindg. - For prom<sup>t</sup> suspends  
or abandons his chance of recovering, wh<sup>ch</sup> chance  
of law deems valuable, & e.g. an infant buys, sells  
& exchanges goods, & his ex<sup>t</sup>. promise to pay  
in consid<sup>n</sup> of forbear. of a suit. - The prom. bindg  
for, for there was a colourable liability, as the  
jury might have found those goods to be worth  
a p<sup>ro</sup>p<sup>er</sup> for in<sup>st</sup> rank. Latch 14. Dyer 27. 100w  
356.

It is said by M<sup>r</sup> Powell that when a prom.  
is made in consid<sup>n</sup> of forbear. a suit ag<sup>t</sup>  
the person himself, the orig<sup>n</sup> cause of ac<sup>n</sup> can  
not be examined, because the person acknowl  
edges his liability. 1 Dow 357. But this rule sure  
ly cannot extend to cases, in wh<sup>ch</sup> the ac<sup>n</sup> shows  
that the forbearance was altogether groundless  
ex. ex. prom to pay to B 100. for forbear. a suit  
ag<sup>t</sup> him for a trespass done by C. - now this  
appears on the ac<sup>n</sup> surely will not support  
the ac<sup>n</sup>. - The rule is certainly too gen<sup>l</sup>. & I  
shd rather think the cause of a prom. sh<sup>d</sup> be  
enquired into in every case - It at most  
can be but a rule of evidence, & goes only to  
throw a cross prob. upon def<sup>t</sup>.

Count<sup>er</sup> where his  
inquired with respect to the prom of con  
sid<sup>n</sup> may be divided into three kinds



Consideration } 1<sup>st</sup>. When that which is stipulated  
on one side is in consid<sup>n</sup> of the performance  
of what is stipulated on the other—these  
the consid<sup>ns</sup> are termed mutual—Thus, when  
A agrees to pay B. for doing a certain act,  
B's act is a cond<sup>n</sup> precedent to his right to  
the money A on the other hand, as oblig<sup>d</sup> to  
pay is in consequence of B's act.—10 Vent 47.  
2 W. 3 Cal 25. 100 106. 4 Co. 11. 1 W. 24. 5. 1 W. 240.

Of then B sues for the money he must  
aver performance on his part, or something  
equivalent to it as that he was ready to  
perform & was prevented by C. or as the case  
may be it was absent when his presence  
was requir<sup>d</sup>. 4 Co. 130. 1 W. 688. 545. 1 W. 1286.  
Long 259. 2 Ray 656. 1 East 203. 208. 619.

2<sup>d</sup>. When the  
consideration of the contract is such that the per-  
formance of both sides is to be concurrent—  
In this case neither can recover for non-  
performance or compell the other to per-  
form, untill he has himself performed  
his part, or what was equivalent to it—can  
A agree to deliver to B. a quantity of wheat at  
a certain time place & price—now here  
neither is obliged to trust the other nor to per-  
form before the other—1 Saund 320. 1 East 203. 619.  
629. 2 W. R. 240. 4 Co. 61. 7 W. 125. 8 W. 368. 1 W. 363.

Of then the agreement is, that one party  
shall do an act for the doing of which the

the other party shall pay the money he acts as  
a condition precedent to the duty to pay - this  
follows from the above rules.

But if accordg. to the terms  
of the contract the money is to be paid on  
a day which is to arrive or may arrive before  
the act can be performed, the owing the act  
is not a condition precedent, but the money  
may be recovered before it is done, if such is  
not after the day appointed for payt. Thus  
A promises B that if he will build an house  
for A he will pay him \$1000. in four  
weeks. Now here B may sue A at any  
time after expiration of the four weeks  
without already performing on his part. for  
the performt. is not to be enquired into. 1 Saund  
380. a. & 2 M. R. 240. 1 Paw 388. 5 D. 592. 7 id 130. & 2 M. R.  
389. 7 E. 10.

and in the latter case the rule is the same  
if no time is fixed for the performance of the  
act. 2 M. R. 233. 1 Saund 380.

But if the day of payt. to arrive after  
the time fixed for the performt. of the act  
the performt. is a condition precedent, & in  
an act to recover the money - or to enforce  
payt. performt. must be averd.

These rules are all founded upon the intes-  
tation of the parties & it will be seen they  
are all adapted for the attainment of objects.

Sal 17. 3 Sal 95. 1. Saund 380. 2 M. R. 240. 6 M. R. 426

L. Ray



consideration } L. May 665. contra L. 76. 114. 115.

§ 2. The third class of contracts, distinguished by the form of their consideration, are those the promises are mutual i.e. independent. This is said to be the case when the engagements on each side is in consideration of the engagement on the other; so that this class differs from the first, in this, that here the consideration is the promise of the other, ~~where~~ <sup>where</sup> the consideration is the performance of the other. In the latter the promise is dependant, in the former they are independent; so that either party may sue the other without alleging performance on his part. As the case may be then may cross suits depend. Between the same parties at one & the same time, e.g. If you promise to build me an house, I promise to pay you \$1000. — now here I promise in consideration of the promise to build, & not in consideration of the building. 1 Vent 177. 214. 114. 115. 58. 1 Lev 293. 3 Bulst 197. Cal 24.

But this last distinction is not observed in Equity. If the plaintiff is obliged to resort to the law upon an independent promise, he must aver performance or readiness to perform, & his bill will be dismissed. This arises from no difference of construction in the law from that at Law — but from a discretionary power of the Court. The object of this Court is not only to enforce equity, but also to prevent

prevent lawsuits - hence it will be unconscionable for them to enforce the promise on one side alone. 1 Foll 383. Finch 445. 2 Freem 35. 1 Cr. P. 164.

When the agreement is in this form which is not an unconscionable one. "I promise to pay \$100. on such a day you transferring stock to me, & on your part you promise to transfer the stock on such a day & promising to pay me the money." - there has been a great deal of question whether it was independent promise or contract. but I never had any doubt upon it; the only correct paraphrase which can be given of the language is - this, "I promise to pay & on condition you transfer the stock" & this is clearly the intention of the parties, - but there some very modern decisions to the contrary, 2 All 1312 where most if not all the judges dissent; it to be independent - but upon this I am I think correct see 2 All 112. Holt 603. 1 Foll 383. 12 All 803. 2 All 271. 5 Foll 761 & 12 All 342 & 5.

But so indefinitely & un-  
limitedly various are the combinations of  
language, that agreements may be made  
in very many diff. forms from those which  
I have mentioned, but the great question  
whether promise be mutual or unilateral must be  
determined from the meaning & understanding  
of the parties as collected from the spirit of



Courts<sup>in</sup> } of the agreement & the nature of the  
cont<sup>t</sup>. or in other words from the order  
in which it was the intention of the  
parties the stipulations sh<sup>d</sup> be perform<sup>d</sup>?  
I not from the order in which they were men-  
tioned Doug 586. 1 BR 645. 6 id 540. 688. 9 id 130.  
6 id 343. 1 Lam & 320 a n. 2 BR 240. 2 Wa

I do assume here that the Eng. Lib of late  
have learned ag<sup>t</sup> construing prom<sup>s</sup> as  
independ<sup>t</sup> - & clearly they never ought to be  
so construed unless the intention is very  
clear; for to suit by one party only leaves  
the duty at the mercy of the p<sup>ty</sup> - so that  
the rule is supported by a prin<sup>c</sup> of Equity. 4 BR 51  
as id 371. Willis 496. 7 East 519.

arg<sup>t</sup>. The mutual promises must  
both be limited, or neither will be so. - for it is  
one of the first principles of cont<sup>t</sup> that to  
render them bind<sup>g</sup> all they must be ac-  
cepted; the mean<sup>d</sup> of this is, that the cont<sup>t</sup>.  
in its nature it binds mutually both  
sides - This rule has been mis-  
applied - for it is not true that one party  
to a cont<sup>t</sup> can't be bound unless the other  
is, for this is the case in a cont<sup>t</sup>. by an  
adult with an infant or feme covert, the  
former is bound the latter not, - I make  
this digression to warn you ag<sup>t</sup> the error Sal  
24. Rob 98. Bow 360.

~~As to the sufficiency of Consideration~~  
absence that the mere act of detaching or  
delivering prop<sup>y</sup> to another upon his en-  
gagement to do some act with it is a  
suff<sup>t</sup> consid<sup>n</sup> to bind him altho his engage<sup>t</sup>  
is gratuitous - This rule is indispensable  
for the preservation of com<sup>m</sup> honesty. 4, 49 Ch.  
delivers a lex or parcel not to B. who engages  
to carry it to M. H. B is bound by the delivery  
of prop<sup>y</sup> - But if B had only promised without  
consider<sup>n</sup> to carry the lex &c &c. he wd not be  
bound, the engage<sup>t</sup> is wholly exec<sup>d</sup>. 2 Ray 909, 910.  
919, 920. Cas 966, 5 Th 443. Tal 26. 3 Sa 11.

The preservation  
of domestic peace & the honor of the family has  
been held in Ch a suff<sup>t</sup> consid<sup>n</sup> to support an  
agreement. Case of a man who had a nat<sup>l</sup> son  
& several legit<sup>e</sup> child<sup>n</sup> - to prevent a dispute  
after his death, & also of publicity of the  
fact wd arise out of a dispute, he made  
an agree<sup>t</sup> with his legit<sup>e</sup> child<sup>n</sup> as to his estate  
wh was held good on suff<sup>t</sup> consid<sup>n</sup> 10th 3. 1  
Pow Cont<sup>t</sup> 362.

So also the compromise of a doubtful right  
is suff<sup>t</sup> consid<sup>n</sup> - This rule applies to those  
cases in wh the parties consid<sup>r</sup> the claim  
doubtful & make a agree<sup>t</sup> with full knowl-  
edge that one of them must be a loser, 10th  
10. 10em 4. 2 Vent 353. 2 Vez 284.

It is not necessary that of consid<sup>r</sup> in



Consideration sufficing in every agreement & to be expressed  
in direct terms as an consideration it is sufficient  
it can be collected from the face of the whole  
engagement taken together as in the case of  
Lord Baltimore & Penn, no consideration was expressed  
upon the face of the covenants still held  
all of it together it was apparent the consideration  
was the settling of their boundaries - It was  
held by Lord Hardwicke to be sufficient 1 Wils. 358.

as to fraud  
in the consideration of a specialty does not in general  
vitiate the contract - The fraud in the execution of  
it does. - The reason is, that when the fraud is  
in the consideration only, there is no want of assent  
for each party secures what he intended to, tho'  
he may be deceived in the value of the thing  
traded about. - As he assented, he is estopped  
by the solemnity of the instrument to aver the  
fraud or want of consideration e.g. if I sell to A a good horse  
for as much as B had given, tho' he turns out  
to be B's horse - B must take his remedy by  
a collateral action - an action on the case -

But in case of a fraud in the execution the case  
is different, - for here the deed is not his instrument it  
is not what he assented to, or yet his seal  
to, his deed was not what this imports to  
be, - so he may show the fraud by parol  
testimony as in case of duress or forgery &  
so vacate & invert the case, of a deed being forged  
made to him; or when he was about to seal

with his real estate for \$100. one by a  
\$1,000 was dexterously slipped into it. Now  
the vendor & latter 2 Bl 804. 2 Ba 594. 2 Cr. 9.  
116 27. 2 Lev 424.

But Equity will relieve a person  
fraud of any kind whatever, & even for a  
partial fraud in the consideration. Ch of Law can-  
not do this - because if they enforce a contract at  
all they must enforce it to the end. But Ch. adapts its  
relief to the exact justice of the case. Thus if A  
by false representation sells B. a quantity of flour  
at \$20 per barrel when its value is but \$10. & takes  
B. bond for it - a Ch of Law must either say if  
bond is good for nothing or give judgment for the value  
of it. But Equity will relieve by an order of B's  
paying the value of the flour - taking care that  
the faulty party pay the costs of suit 1 R. W.  
203. 3 ib 290. 2 Pow 145.

And the rule of Law appears to have  
formerly been the same as contract exec<sup>n</sup> without  
and in such parcel contracts as were actually  
carried into execution on one side, & thus in  
case of a parcel sale of goods by false represen-  
tation as to their value by which the vendee was  
deceived - Vendor could recover the whole amount  
of the agreement. The fraud was no defence, but  
Vendee was deemed for his remedy to an action  
the case Peak C 203. Lamb 394. 4 Esp 95. 2 Levis 109.

But in the  
case of parcel contracts, the rule of law has



Conscience } has been greatly relaxed by modern de-  
cisions & intent as far as this late one can  
be considered as settling the law the rule now  
does not apply to simple contract or in other  
words fraud in the consid<sup>n</sup> may be availed of  
any simple contract sued by one party tho' there  
was an express promise to pay a given sum, &  
if the fraud is total it will destroy the whole  
contract if it was partial it will go in  
mitigation of damages & Camp 29. 190. & Johns  
253.

There is a number of very important & practical  
all distinctions arising out of this subject of  
fraud in special contracts, but for them I must  
refer you to Mr. Whist<sup>n</sup> on the case.

I believe here I would  
say that in Con. a total fraud in the con-  
sid<sup>n</sup> of a specialty has been regarded as a good  
defense at law, in the case of Knight & Mor-  
gan & he refused to consider the question but  
sent it to Law. see also 1 Robt 385. 305.

Tho' it is agreed that if there is a partial fraud  
in the consid<sup>n</sup> of a specialty the relief must  
be had in Equity

If the fraud is total the alleg<sup>n</sup> or all the  
alleg<sup>n</sup>s complained upon are not in suit  
relief may be had in law - otherwise the  
situation of the party wd be dreadful, hav-  
ing the alleg<sup>n</sup>s constantly suspended over his  
head, & liable to be deprived of his money & redeem

## Of the Interpretation or Construction of Contracts.

The object proposed in the construction of contracts is merely to ascertain the intention of the parties, & a contract however expressed earnestly & right fully, is carried beyond this intention. 1 Pow 370-1.

And all contracts are to be construed to the full extent intended? provided the words of it can be so construed as to effect that intention. 1 Pow 372.

In the construction of contracts the words are to be understood accordg. to their ordinary & most known i.e. popular signification, unless some decisive reason can be shown to the contrary. 1 Pow 373. 1 Pow 109. Poph 55. 2 KB 413.

Thus if A agrees to buy of B. 10 barrels of casks he is not to have the barrels for this is what is always understood to be the case. But if he buys a pipe or barrel of wine, he is to have the pipe for the same reason. 1 Pow 374.

The word, "month" when used in a contract accordg. to the C.L. generally is understood to mean four weeks or a lunar instead of a calendar month. But if a lease is made for "a twelve month" it is held to be a lease for a year. 10. antio. & Co 51. 2 Bl. 141. 1 Pow 375.

Words expressive of quantity are contracts and as they are understood at the place when spoken - as in some parts of G. B. a bushel contains 32 lbs. in others 20. & in others I think but 16.



Construction } Still if money is made pay all  
by evnt. the denomination is to be understood  
accordg. to its import at the place where pay  
all est. a court in Lond. to pay £100 in Dut-  
lin. - it is to be understood not Sterling. - This is also  
founded on the supposed intention of the parties  
2 Br. 386 90. 1 Dow 346. 407.

and when the language  
of a court is ambiguous, the true intention of  
it may be often inferred from the subject, the  
effect or circumstances, or from all united.  
An illustration of these first.

From the  
subject - a strong case to send a life this arises  
out of a covenant for quiet enjoyment, also  
a warranty in a deed - est. & shall enjoy his  
house without the est. hindrance, disturbance  
or eviction of any person. This has always been con-  
strued not to extend to tortious entries, but only  
to entries under a higher title - so if a title  
is vitiated by a mere wrong done upon it is not  
lost - for he cannot be considered as quies-  
cent, agt. the tort of all mankind. Cas 11 25.  
Cas 8 22. Str 400. 1. 680. & 691. 4 Br. 519. 3 ib 58.  
1106 34.

or also the intent may be inferred from the  
effect - as from necessity that the court may  
rather take effect than fail, an inst. may  
be made to operate as if it was an inst.  
of a diff. form & structure, thus it is a rule

rule that one joint tenant cannot enjoin the other for both are seized for ever & for both if then one makes a proviso to the other as it shall take effect as such - it shall operate as a release - and so also a covenant never to sue a debtor, is a release of the debt - And in a vast variety of cases - for this is the only way in which they can be carried into effect. 2 Sound 96. Cro. E. 352. Lat 5, 14. 3 ib 299. 100 R 446.

Upon the same principle an instrument in the form of a deed or covenant may operate as a devise - Now no man can by deed grant a fee to commence in future, if then one should make such a grant it would operate as a devise for by a devise such an estate can be granted *per antea*?

Case? The intention may be often independent from the effect of diff. construction thus, if construing the covenant accord<sup>d</sup> to the usual meaning of language will render it ineffectual & frivolous, the diff. construction may be put on words in a way which will save them, & hence it is that a covenant tho' severed from a limitation may be construed as one. 3 Leon 211. 2 Ed 155. Cro E 285.

So if an annuity is granted for the maintenance of a child or for doing any other service, the grant is conditional tho' it is not expressed - a reference to the substance shows that unless it never over a condition, the right



Constructive { object of the grant will not be at-  
tained. May 14. -

And the circumstances attend a trans-  
action may be referred to to explain a construction  
otherwise not be doubtful as if a grant on  
annuity & B gave condition imposed at im-  
pend. This shall be meant for his profession-  
al counsel

And if one having good  
in his own right & also <sup>as Exr.</sup>, grants away  
all his goods, the grant shall be construed as ex-  
tending to those only which he holds in his in-  
dividual capacity. Dow 585. 3 Mod 278. Lit 111 535.  
15.7 Bar 8405.

And a case which arises more frequently than  
any other is, that of a release containing a release  
of some particular claim & followed by some words  
words of release as "in full of all demands," how  
the rule in such case is, that these last words are  
qualified & restrained by the former special release  
& limited in their effect to the subject of grant.  
at. Case. & award B \$1000. & in his will he gave  
him a legacy of \$10. The latter was paid by  
by C & B. B. gave a release covering upon the  
legacy, & concluded with the words "in  
full of all demands" by the test, & release was  
construed not to extend to the \$1000. but only to  
the \$10. 1 Eq. Ca 170. 3 Mod 278. Cro 9170. 2 Ray 235. 4 Wm  
290. 1 Dow 945. 2. -

But when the receipt of a particular  
sum is acknowledged, & there is no release

Constructing <sup>the</sup> ~~condition~~ <sup>partic.</sup> clause of rental is added, the  
genl. words and have their full effect for another  
intention can be collected from them eg. *ind.*  
of *Co. p. 5* in full of all demands. *Part. 119. 1 Shaw*  
*155. 3 Inst 277. 1 Inst 409.* But the last one  
cannot be Law.

But if after the application of  
the above rule the contr. still remains doubt-  
ful - it is in genl. to be construed most  
strongly agt of party bound, & most favour-  
ably for the other, for the words used are the words  
of the party bound & it is his own fault that  
they do not clearly express his intention  
tho' it then in their construction shd rather  
construe them agt him than agt the other  
party. *4 Co. 96. Plow 140. 101. 171. 289. 1 Inst 197a*  
*267b.*

There is an exception to this rule when the  
ambiguity is in the condition of a penal bond  
the construction is in favour of the obligor  
or party bound. - for tho' the contr. is his &  
the words are his. & the cond. is for his  
benefit, still it is to entice him from the  
penalty - of wh. the Law is very jealous & will  
not enforce it when it can be evaded. *By*  
*17. 5 Co. 22. 23.*

Tho' it is said that if one is bound in a pen-  
al bond conditioned to pay money on such a  
feast & that of are two of them in the same  
year he is to pay at the last. But if it <sup>has</sup>



Construction } had been a single bond or promissory  
note or covenant to pay the money on such a  
lease it wd be construed to be \$2 on 3 first. - 1.  
Pow 397. Dy 17a.

Further is one is bound by a penal bond  
to make a suff<sup>t</sup> & lawful estate by & acc<sup>rd</sup>.  
to the advice of S.B. if he make an estate by  
such advice whether it be a suff<sup>t</sup> & lawful estate  
or not the cond<sup>n</sup> will be discharged tho  
the convey is void. - I speak merely of the con-  
struction, for I doubt not but in such case  
Eq<sup>ty</sup> wd enforce agreement s & 338. Perk 2277.

There is another exception, when the application of the gen<sup>l</sup>  
rule would or might occasion an injury to  
a 3<sup>d</sup> party. Now it is a gen<sup>l</sup> rule of law, that  
if a man make a lease to B. without limitation  
of time it shall last for B's life. - But if a  
tenant in tail makes such a lease it shall  
be for his own life & not for that of B's, the  
construction most advantageous for B's life,  
he to have it for his life - But if such was the  
case if he survived B or it wd prove an injury  
to the issue in tail 1 Inst 42. 1 Pow 400.

And in these  
cases words are to be construed in the most  
comprehensive sense in wh they are gen<sup>l</sup>  
employed. Thus a covenant of warranty against  
the claims of all men is construed to mean  
a warranty ag<sup>t</sup> claims of all persons. etc<sup>d</sup> Two joint

joint tenants make a sale of all their goods, it embraces not only all the goods he hold as joint tenants, but also those they hold as individuals. 1 Dowd 401.

When legal language is used in a contract it is in genl to be understood accord<sup>d</sup> to its legal acceptation, as in making use of the technical words "heir" "him of the body" &c. 2 Roll 253. 1 Dowd 402. Thus if an estate is limited to A for life & then to his heir as long as he shall continue to pay a certain annual sum, & limitation extends to all the heirs of A forever i.e. as long as the succession of him either lineal or collateral remains, - for the word "heir" is not descriptive of personae but of the quantity of interest conveyed.

And courts are in genl to be construed accord<sup>d</sup> to the "genl" intent appearing upon the whole context, even tho' this intent sh<sup>d</sup> be opposed to some particular words used in it. 240. Bro & 43. 615. 1 Dowd 413.

If the thing stipulated for in the contract is not delivered or done at the time required by the contract the value of the thing at the time fixed for performance is in genl. the rule of damages. Thus, A contracts to deliver a quantity of wheat on the 1<sup>st</sup> of July - at what time wheat



~~Constructive~~ <sup>Constructive</sup> was worth \$2. & fails to deliver. & money is had agt him in Sept when the value is but \$1. Plff has judgment for what it was worth in July - for Plff was entitled to it when at the high price & he might have availed himself of it so deft shall pay the damage

But there is an exception when the value of an article has risen after the time appointed for delivery, in such case the value at the time of recovery is the rule of damages - for if deft had delivered at the appointed time Plff might have kept it & availed himself of the high price - the court shall be construed strongest agt the covenants

Ex. Suppose if price was higher in August than it was in July or at the time of trial? There is no case decided this, I once searched the books for the purpose find none - but I state it that upon the same principle, deft wd be obliged to pay according to the highest price. 1 Vern 214. 2 ib 394. 1 Eq. Ca 220. 2 Stra 406. 2 Burr 1010. 2 East 211. 1 Bowd 409.

If several instruments are made at the same time between the same parties & concerning the same subject they are all to be considered as parts of the same contract & as such are to be taken together in the constr.

construction of it eg. A makes an absolute conveyance to B. A B at the same time gives back a deed of defeasance, i.e. a conveyance relating to a deed, that if a sum of money is paid the deed shall be void. - then inst<sup>ts</sup> taken together make a mortgage, Or eg. A gives a single bill binding to be paid at a certain time & delivers it to B. A B at the same time delivers back a deed of defeasance &c, together then instruments constitute a penal bond & are only distinct parts of the same con<sup>tr</sup>. 2 Vern 576. 1 Pw 410. -

Of annulling, discharging & waiving contracts.

On this subject I would premise that until the terms of a proposed contract are accepted on both sides, if contract is not consummated & of course either party may retract the offer he may have made. 3 Tere 639.

But an offer made on one side and accepted by the other, becomes a contract. - for the offer & accept<sup>ts</sup> constitute a contract is binding & may be enforced by either party when he has performed his part, or tendered perform<sup>ce</sup> eg. I say to you B \$20 for his horse & B says he will take it, now if by tendering the money, may recover the horse. 2 Bl 441. Hob 44. 2 Ba 241. 2 Pw 634

and if upon such an offer made on one side & accepted by the other, an earnest



Amount of Cont<sup>l</sup> } earnest is paid, or a future time  
fixed for the completion, the contract is consum-  
mate. & the prop<sup>r</sup> who is of subject of it is bound  
May H. 2 Bl 447. 1st ed 363. & 364. In saying that  
"the prop<sup>r</sup> is bound" it means, that the vendor  
acquires a present right of future prop<sup>r</sup>, i.e.  
at the time agreed upon for delivery or completion,  
does not that he acquire a present right to imme-  
diate prop<sup>r</sup>?

But if the offer being made on one side  
& accepted on the other, nothing more is done  
but the parties separate i.e. they separate, no  
pay<sup>t</sup> of the price, no delivery of the goods, no earnest  
being made or time<sup>2</sup> future appointed for the  
performance - there is no contract, or rather the  
contract is waived at the time of making, for  
in such case it is to be understood that the contract  
is to be performed instantaneously & as if parties sep-  
arate without per<sup>r</sup>form<sup>t</sup>, <sup>if, appoint of future time &c</sup> it is abandoned, for un-  
certainty 2 Bl 447. Flow. 202, 309, 1st ed 363. 2d 316.  
Hov 261.

It is as if A agrees to sell goods to B  
provided B shall choose to purchase them  
A gives notice to B within 24 hours, now if  
B accepts of offer A gives the notice within 2  
time limited, still A is not bound - for  
when the parties separated B was not bound  
there was no complete contract - & the law  
will not hold one party to a contract unless  
the other was also bound, & A is not bound

Sound unless he makes a new contract after  
the acceptance by B. - But may take advantage  
of this locus *penitus* 2 RR 653.

Therefore a  
right of action has accrued on a simple contract. The parties  
may rescind it by expressing their mutual  
assent - for here there being no breach there is  
no right created in favour of either party  
e.g. A sells & delivers a horse to B. now any time  
before it is agreed on for payment they may agree-  
cancel the contract by parol. Com. D. M. 28 B. Cas E 388.  
2 Lev 144. 4 Ba 465.

But after a right of action has ac-  
crued, as by a breach, it cannot be discharged by  
parol or in any other way than by a release  
by deed unless it be that a new agreement is  
made & executed as an accord & satisfaction e.g. A  
agrees to deliver a horse to B on Monday next,  
on that day he delivers him, & agrees if B.  
will not pay - this discharge is not good  
by parol for a right of action has arisen in favour  
of A now it is not a revocation of the contract  
but a discharge of a right consummated, as to which  
the Law requires greater solemnity, than in the  
discharge of a contract. Cas E 388. 1 And 258. 2 Ch 44.  
12 Mod 538. 10 And 414. 4 B. 415.

It is however a rule of  
Law that if acceptance of a bill of exchange may  
be discharged by parol & even after it has be-  
come payable: now in point of time this



~~Annul the contract~~ There is one diff<sup>y</sup> between this and  
the purchase, and this last case & rule is  
a positive one of 4 L. Max. It is not governed by  
the genl prin<sup>l</sup> not govern contract in genl. Doug  
235. 247. Chit B 83.4

And in Equity, an agreement may be  
waived merely by a long omission on both  
sides to sue, or claim under it. Thus, when  
there was an agree<sup>t</sup>. between landlord & tenants  
as to the enclosure of a certain com<sup>o</sup>, & it  
had laid dormant 20 years, a bill filed upon  
that agree<sup>t</sup>. was dismissed - for in such cases  
it is to be presumed that if agree<sup>t</sup> was aban-  
doned, neither will the Ct in its discretion  
allow a recovery upon so stale a contract. 9  
Mod. 3. 2 Eq. Ca. 10. 2 Cas. Ch. 10. 1 P. W. 413.

And a contract  
consummated & used may be rescinded by the sole  
act of one of the parties, when there is a pro-  
vision to that effect in the orig<sup>l</sup> contract itself.  
e.g. A bot a carriage & horses of B, & paid for  
them, & delivered the car &c. & it was agreed  
between them that if he did not like them  
might rescind the bargain within a given  
time - The Ct held that A by a provision in  
contract might rescind it, & maintain indeb.  
apt. for his money paid 15 R. 135. 7 ib. 201. Bow-  
s 135. Doug 23. 2 East 145. 1 W. R. 351. 3 Esp. Ca. 52.

There is  
on this subject a rule laid down by Mr. Powell

Power; the propriety of such a compromise is  
to be ascertained. It is. If it is worth with B. to  
certain prop<sup>y</sup> at such a price as J. T. shall  
name, the parties cannot in the mean time  
annul it, for they have engaged a 3<sup>d</sup> party  
to perfect it. Now if cannot be law, it ap-  
pears to go upon the ground that J. T. has  
an interest in the contract wh. is not the  
case. He is merely referred to, as to a max-  
imum price. It is but an instrument, to set  
the value of J. T. prop<sup>y</sup>. *Case 115, 416. Powell Dec.*

*It is said that the parties may release each other by deed. He states the release of a contract is a release of the contract. It is said that the parties may release each other by deed. He states the release of a contract is a release of the contract. It is said that the parties may release each other by deed. He states the release of a contract is a release of the contract.*

Canst the parties make by deed the authority given the 3<sup>d</sup> person by deed? But if this  
authority can be revoked, the contract may be annulled. for it is never to take effect but by virtue of  
that authority. A tacit or implied release may arise from  
cancelling, turning it. for this annihilates  
the contract by destroying the instrument which  
by it must be proved

So also if he who was to be benefited  
by the contract, prevents the performance the other  
party is discharged e.g. A was to build a house  
for B. who prevented his going on to the land  
or obtaining the materials &c. A is discharged.  
80 91-2. 1 Inst 206. 2nd B 344. 1 Pow 265, 416. & in this  
case the party who was to perform A was  
ready to perform & was thus prevented in  
the same situation he would have been in  
had he actually performed. & we may maintain  
an action to recover the stipulated price!  
Inst 2106. 1 Pow 419, 420.



Annulment of Debt.

A debt may be annulled by a new & higher court for the same thing, - for the new court merges the orig. one, & a bond being given for a debt on simp. court merges the simple contract, & if a judgment is rendered on either a simple court or a bond they are merged in the judgment. For a judgment is of a higher nature than a bond &c. The reason of the merger in these cases is, that it is certainly contrary to the intention of the parties to have a two fold debt & furnish a two fold remedy, but it is merely to furnish a higher remedy, or a more complete evidence of the debt. 6 Co 45. 3 Ba 124. 1 W. B. 155. 3 East 251.

But such is not the case if the higher remedy or court is entered into by a stranger. Thus if A indebted to B in a given sum & C give B a bond for the same sum, the simple court of A is not merged for here the object & object is to give C and A furnish an add<sup>l</sup> security to B. - In this case the creditor may sue either the simp. court or bond debtor. 2308. Dav 113.

And a court

of a given degree cannot be extinguished or merged by a new one of the same degree e.g. as is already indebted by prom. & then makes another prom. to pay the same debt the suit

misnomer to test on either promise 1 Bur 9.  
Cro E 517. Cro J 579. Chit B 62.

It is to be observed how-  
ever that when the case is such that the 2<sup>d</sup>  
court being of the same degree as the former  
is intended as a substitute, & may of an-  
d satisfy of it former, it will be an offer  
that bar to a suit on the former - but  
if mere plea of a latter court will not  
bar 5 Co 117. Sta 486. 2 M 20. 3 E 251. 5 it  
232.

And further when a court of a lower rank  
is inserted in a new one of a higher  
rank & may of suit or to dissolve & one  
say the remedy - the former is not merged in  
the latter: e.g. a bailiff makes a deed acknowl-  
edging the receipt of a certain sum of money  
an ac<sup>t</sup> of account may be supported & the  
debt be given in evidence. So suppose the sale  
of goods gives bailor a deed acknowledging the  
receipt of them. Bailor may still sue seller  
in detinue - for it is not intended the  
simple court shall be turned in to a spec<sup>ie</sup>  
but only to furnish an add<sup>re</sup> remedy. And  
gen<sup>l</sup> speaking when a court of a higher rank  
merges one of a lower, the only consid<sup>er</sup>  
of the latter is kept out of sight, & thus pre-  
cluding all enquiry concerning it - but in  
the last cases there is an acknowledgment of an  
existing simple court & Inq<sup>u</sup> 1 Ba 19. Roll



Annals of the Court 118. 2 Bulst 250. And E 644. 1 Paw-  
218. 228. 225.

A count by deed cannot be annu-  
led by any new contracts by deed, for  
it is a *mutuum quodque*, *diversitates*  
et *legamine* and *legatus* 6 Co 44. 2 Wils 82  
346. 1 Saund 294m. Cro J 254.

And it is laid down  
in all the books that even pay<sup>t</sup> or accord  
& satisfaction are no discharge of a bond  
- but this strange rule is founded upon  
a mere verbal distinction viz. The debtor  
cannot plead payment of a bond but  
he may plead pay<sup>t</sup> of all the money debt  
due & not is due on the bond. Gelv. 192.  
Cro J 254. 7 Mod 144.

So again it is said accord & satisfaction cannot be  
pleaded as a full discharge of a ~~count~~ bond. But  
an ~~accord~~ satisfaction in full of all damages accruing  
& to accrue on a count is a good plea & an.

When the  
right & duty created by a count are united in  
the same person the count is at law of course  
discharged, as when a debtor becomes ex<sup>r</sup> to  
his count - for no one can sue but the ex<sup>r</sup> &  
he can sue himself & Co 120. La C 008. 2 Paw  
260. 4. 5. 9 Mod 62. 10 id 515. 3 Ba 698.

The rule is the same in  
equity when the debtor becomes the ex<sup>r</sup> - for  
in such case - the money becomes of ~~the ex<sup>r</sup>~~ ~~at~~

at any rate as soon as money is recd. 10 Nov 49.  
499.444.

In these cases however relief may be had in  
Equity for the purpose of doing justice to  
3<sup>d</sup> persons, as in case the Ex<sup>r</sup> owes his debts  
estate, & then are not a part of the estate  
charge all the debt, Ex<sup>r</sup> may be compelled in  
Ch to pay his debt.

A contract may be discharged  
by an act of the Legislature; such contract being  
declared illegal after the parties contract was  
made, as a contract to perform a certain voyage  
in a given time & there is an embargo  
law in Dec 198. & Nov 51. & 1851.

So also by the act of God or  
inevitable accident - e.g. Lepu covenants  
to have all the timber trees stand at the  
expiration of his lease & they become de-  
stroyed by lightning - Lepu is discharged - all  
that was intended by his covenant was that  
he wd not destroy them, not that he wd  
insure them. 10 Nov 208. & 98 Nov 95.

So also if an article built  
by A to B - as a house & he wd live in it & be de-  
stroyed by lightning - A is discharged - So if goods are  
destroyed by lightning, his oblig<sup>n</sup> is discharged  
& then and of course he is discharged. 10 Nov 54.  
10 Nov 447-8.

Alg<sup>n</sup> if one is bound in a bond con-  
ditioned to convey land on a certain day



Small Court } day & he dies before that day  
the penalty of the bond is void & he is  
discharged from the penalty but he will  
compell the heir to make the conveyance  
10 Co. 18.

The act of a third person who  
conveys may relate to him, cannot  
regularly discharge or vary the terms of  
it. Thus if A gives a bond, that B shall ap-  
pear at A's on 8 days notice & answer the  
judgment. If it was not satisfied then he  
in B appeared - upon 6 days notice the judgment  
was reversed & if not satisfied, A was  
discharged 10 Co. 451.

If however a writ  
is to take effect, be annulled, or varied by  
act of a 3<sup>d</sup> person, he act will effect the  
writ to the extent of the provision. Thus  
an agreement to pay so much for a tract  
of land as J. S. shall say it is worth, the  
parties will be bound by the price he  
fixes - & if he refuses to fix any price  
the agreement will be destroyed 10 Co. 415. 416

Finis.

















# Pailments

By Judge Gould. May 1<sup>st</sup> 1817.

~~~~~

## Pailment

is defined to be a delivery of goods on a contract  
express or implied to restore them to bailor  
or according to his directions, when the price  
therefor which they are bailed shall be an-  
swered eg. A delivers goods to B. to be kept.  
or to a tailor to be made into clothes etc. &  
Mc451. Jones Nat. 3.4.

Every bailment is a qualified  
prop<sup>y</sup> of the things bailed, in the bailor, &  
this is a kind of very extensive application

It is said in some of the old books that  
a pawnor differs from a bailor, in this, that  
he has a prop<sup>y</sup> in the goods pawned, but the  
diff<sup>y</sup> is not correct for the bailor even has a  
qualified prop<sup>y</sup> a special interest in every  
bailor, see of prop<sup>y</sup> in 4 Co 53 b. Southcoats case &  
1 Inst 392. - 1 Br 240. Dant & Thid. 129. Jones 112.  
78 N. 392. 397.

Indeed it may be laid down as a proposition  
not admits of any exception, That a mere law-  
ful possession presupposes a prop<sup>y</sup> includes a  
qualified property - it was held in an ac<sup>n</sup> by  
a tender 2 Br 305.

accord<sup>y</sup> to the diff<sup>y</sup> the bailor

bailee is to restore the prop<sup>r</sup> bailee to bailor. &c. by this is not to be understood that bailor is liable at all events in case of loss or damage to the - for if he should fail to restore the goods in consequence of a loss wh. happened not from any neglect of his, regularly he is not liable 1 Ba 236. Jones &.

To determine when bailor is liable in fault, in case of loss or damage sustained, the nature of g<sup>d</sup> bailed & quality of the thing bailed are to be regarded as well as the conduct of bailor - for diff<sup>t</sup> baill<sup>s</sup> require diff<sup>t</sup> degrees of care, & <sup>as to</sup> a large article of little value that one might be a careless vagrant, wh. not a gross neglect of one of small bulk & of high value - Ex of jewels, Jones &.

The principle which under this title is to ascertain what are the proper degrees of care & diligence required of the diff<sup>t</sup> kinds of bailors in all cases, or when bailor can recover ag<sup>t</sup> bailor.

The most gen<sup>l</sup> rule is. That bailor under a gen<sup>l</sup> acceptance is bound to keep, or, as the case may be, use, the goods with a degree of care proportionate to the nature of the bail<sup>t</sup> - in some cases the care must be greater & in some less than what is called ordinary care.

Then promise that an



Bailt<sup>y</sup> an accept<sup>n</sup> by bailor is said to be gen<sup>l</sup> when there is no special agent<sup>n</sup> as to the care he shall use or <sup>degree of</sup> responsibility he shall incur a bailt<sup>y</sup> is then said to be gen<sup>l</sup> when a degree of care is left to be determined by law.

On the other hand a special bailt<sup>y</sup> is when there is a sp<sup>l</sup> agent<sup>n</sup> either extend<sup>g</sup> or qualifying bailor's legal liability; & this agent<sup>n</sup> supersedes his legal liability upon the max<sup>im</sup> of *propter factum tacitum*.

All the diff<sup>s</sup> rules so laid down under this title, in relation to the degree of care or diligence required of bailor are to be understood as applicable to gen<sup>l</sup> accept<sup>n</sup>ances alone - for when there is a special agent<sup>n</sup> <sup>is</sup> the measure of care & excuses the case entirely.

With regard to the different degrees of care & negligence the Law distinguishes them into three & three only - the minute subordinate degrees are not defined at all.

The standard from wh<sup>ch</sup> these degrees are measured, is what is called ordinary care & diligence, by this is meant such as rational men in gen<sup>l</sup> use in their own affairs. or in other words, it is that care wh<sup>ch</sup> rational men of com<sup>on</sup> prudence use in their own affairs Jones 9. 10.

The degrees of diligence on each side  
of this stand are not distinguished by  
any technical & appropriate denomi-  
nation, but are expressed only by periphrasis  
as what exceeds ord<sup>o</sup>. dilig<sup>o</sup> is more than  
ord<sup>o</sup>. dilig<sup>o</sup>. - And it is evident that  
every degree of dilig<sup>o</sup> then is a correspon-  
ding degree of default, or neglect. "Negl<sup>o</sup>"  
as then used consists in the omission or  
want of care of some degree. Hence if  
omission of ordinary care is called ordinary  
negl<sup>o</sup> i.e. it is the omission of that care  
wh. every prudent & vigilant <sup>man</sup> uses in  
his own affairs

the omission of that care which very atten-  
tive & prudent men take of their affairs  
is less than ord<sup>o</sup>. negl<sup>o</sup> & is called slight  
negl<sup>o</sup>

But the omis<sup>o</sup> of that care wh. in atten-  
tive men use in their affairs is more  
than ord<sup>o</sup>. negl<sup>o</sup> & is called gross negl<sup>o</sup>  
Jones 17. 12. 30. 31.

Gross negl<sup>o</sup> is generally regarded as  
evidence of fraud in the bailor i.e. it is prima  
facie fraudulent. But the presump-  
tion may be rebutted. - for if bailor has  
been guilty of the same neglect with the care  
that he his own goods as to those of bailor  
bailor is excused. However gross may have  
been the negligence 2 Ray 915. Jones 20. 55.



Standard of care

The most general rule as  
stated above, is, That bailor is to use such a  
degree of care as the nature of the bailt requires  
show for the purpose of applying this  
rule it will be much to observe three other

Rules. 1<sup>st</sup> When

the bailt is exclusively for the benefit of bailor  
or to his living and advantage, whatever  
is it, nothing more than good faith is  
required of bailor, or, he is responsible for no-  
thing less than gross neglect or want of good faith  
& this is founded upon the equitable maxim  
"qui sentit commodum, sentire debet onus"  
e.g. A takes the goods of B. to keep them &c. &  
is to incur no reward, if they are damaged  
except this & gross neglect &c. he will not  
be liable, however strong the law of mor-  
tality may apply. L. Ray 916. 1 Par 247. Jones  
13. 32. 51. 64. 101. 132.

I observe in passing, that in Southwick's case  
4 Bro 83. it was holden obiter by the Ct. that  
the bailor must keep the goods safely at  
his peril, but this is not now deemed  
to be law, as is the case with almost every  
point laid down in the case, tho the  
decision is correct Jones 22. 23. 51. 52. L. Ray  
916.

2<sup>d</sup> When bailor only, is benefited by the  
bailt. he is liable for a slight neglect, or  
a fault more than ordinary care

Bailment. core, this also is upon the maxim  
qui sentit commodum sentit onus

3<sup>d</sup> When

the bailt. is mutually advantageous, &  
the risk or obligation hangs in an even  
balance, the bailor is bound to use adv.  
care, but not more - he therefore is liable  
for ordin<sup>y</sup> negl<sup>t</sup>. but nothing less - for  
if these last rules see Jones 14 to 16. 2 B. 32. & 9.  
101. 105.

### Different kinds of Bailment

I shall

enumerate the diff<sup>t</sup> kinds of Bailt. & then  
explain them in their order.

By the Ed. the  
kinds of bailt. are six. - Sir W. Jones ac-  
knowledges but five. & I must confess  
I do not think the Ed. division is the  
most logical, but it is the division made  
in the divisions of the Ed. & by L. Holt, in  
the case Cogge v. Bernard & Ray 9<sup>th</sup>. The max-  
im a carta of the Law of Bailments

The first kind  
is called deposit in Law Lat. depositum.  
This is a delivery of goods to bailor to be kept  
for the exclusive benefit of bailor, & with-  
out reward. As this a bailt. merely for  
the purpose of custody, it is sometimes called  
a naked bailt. - & of bailor, a naked bailor.  
But



Kindly. But he is usually called a depository.  
L Ray 912. 11 M.D. 71. 12 Nov 247.

This kind is called  
it is called in lat. commodatum, there  
is no denomination consisting of a single  
Eng. word wh. distinguishes it, - it is some-  
times tho' not often called a "loan for  
use," - It is a gratuitous loan of goods to  
be used by bailor for his own benefit &  
to be returned specifically. As the loan of  
a horse & carriage for a journey - here  
bailor is called the lender & bailee, the  
borrower. L Ray 915-6.

This species of bailt. however it is to be  
observed, differs <sup>from</sup> what is called a mutuum  
nam, tho' in some of their features  
they are precisely alike, for a mutuum  
is a loan & is gen<sup>lly</sup> gratuitous, but it is  
for consumption & not for use, is to be  
repaid in spec<sup>ies</sup> of the same kind, tho' not  
specifically, as if A lent money to B. This  
comes within the denomination, tho' d.  
is not properly to consume it, but he is  
not expected to return the specie money  
lent, tho' he is to return money, as also  
the loan of bread, flour, wheat, wine &c.  
& as this spec<sup>ies</sup> lent is not to be repaid in spec<sup>ies</sup>  
it is not a bailt. - the absolute prop<sup>ty</sup>  
rests in y<sup>e</sup> borrower, who in case of loss  
cannot replace it himself. Last & 127.  
12 Nov 247.

The third kind of bailt is called  
Locatio et Conductio, it is a delivery of  
goods to be used by bailor, he pay<sup>s</sup> some  
hire or reward to bailor, as the hiring a  
house &c. Bailt is called Locatio. Bailor, Con-  
ductor. Now I will call this letting &  
hiring, as I did the former, Lending &  
borrowing - but this is not legal language  
Jones 50. 113. Row 251.

The fourth is a delivery  
of goods to secure a debt due from bailor to bailor, it  
is called in english a pawn or pledge. Bailor is  
called ~~Pawnor~~ bailor. Pawnee L Ray 913. Jones  
50. 104.

The fifth is, a delivery of goods, for some act  
to be done on or about them by bailor for whom  
he is to be paid, There is no appropriate techni-  
cal denomination for this, it is distinguished by ~~terms~~  
phrases thus. "Locatio operis faciendi." L Ray 913.  
917. Jones 50.

This class of bailt includes a delivery of goods  
either to a common carrier or one who car-  
ries goods in his public employment or to a  
private carrier or any other bailor, & this  
is called "Locatio operis mercium vehendarum"  
it are.

The sixth is a delivery of goods for some  
act to be done on or about them, but no  
reward is to be paid in which alone it differs  
from the last kind - It is called a mandate  
in



Rule of Bail in later mandata. The bail  
is called the mandatory L Ray 913. 918. Jones  
80. 72.

Of the Depositum This you will see  
collect is when goods are delivered to bailor  
to be kept without reward, - the bail is  
then advantageous to bailor only, accord<sup>d</sup> then  
to the three rules of discrimination above  
said above, Bailor is bound only to observe  
good faith and is liable only for gross negl<sup>t</sup>.  
& this is but evidence of fraud when it follows  
that he is not liable in all cases of gross  
negl<sup>t</sup>. See & L Ray 129. L Ray 909. L Ray 1098.  
1 Paw 211. 24. 8. 12. Jones 82. 64. 5. That gross  
negl<sup>t</sup> is but evidence of fraud see L Ray 915. 200  
252. L Ray 581. Jones 13. 30. 64.

You will find <sup>is it?</sup> some of the looks & even  
modern ones, too, that ev<sup>d</sup> case will excuse  
the bailor, ~~where~~ you may conclude the  
want of ev<sup>d</sup> and subject him; This is  
said by L Holt in L Ray 913. But this is not  
the case, the expression was loosely made  
use of before & term "ev<sup>d</sup> case" was fully  
defined L Ray 910. 1 Paw 247.

I repeat it a depositum is not liable  
in all cases for gross negl<sup>t</sup>. indeed I think  
the correct way of speaking & thinking  
on this subject is, that a deposit is not  
liable in any case for negl<sup>t</sup> as such, in  
abstract, but only for fraud which is presumed  
from

from the night. It is admitted he is not  
liable for any neglect however gross, if he  
can rebut the presumption of fault. I do not say  
that if bailer is an idle careless drunken  
fellow, comes home drunk. & leaves all his  
doors open & by reason thereof the goods <sup>bailor</sup> hap-  
pen to be stolen with his own, he shall  
<sup>not</sup> be charged, for it is bailor's folly to trust such  
an idle fellow. 4 Burr 2300. Stra 1099. Llay  
555. 914. Jones 65. 6.

or Deposit<sup>or</sup> by the way <sup>may</sup> as may any other  
bailer, subject himself by special agreement.  
Even to inevitable accident. Llay 563. 911.  
918. 3 Burr E.L. 245. 5. 394.

Sir Wm. Jones introduces an exception to  
rule which is now recognised in any of the  
books, viz. That when a man spontaneously  
& officiously proposes to become bailer of another  
he shall be liable for negl<sup>t</sup>. But  
this is too refined a distinction for practice  
Jones 67.

The old rule was very diff<sup>t</sup> from <sup>what</sup> it now  
is as it regards g<sup>d</sup>. subj<sup>t</sup>. for in Southcot's case  
it is laid down by L Coke That Deposit<sup>or</sup> must  
keep goods safe at his peril & is care<sup>less</sup>  
and E & 12<sup>th</sup> 2 Da 236. 241. contra Llay 555. 911. 913. 4.  
Stra 1099. Com Rep 133. 135. B & M 72. Jones 59.

In Southcot's  
case the defendant was an engaged agent  
to keep the goods safely & of agent approved upon



think of Bailt upon the law of an<sup>er</sup>. When the  
goods were stolen, & decision ag<sup>t</sup> bailer, & I  
think rightly decided, that almost all the law  
in the case is lost. The decision is right, 1<sup>st</sup>  
because debt was specially found, & 2<sup>d</sup>. The plea  
was lost, as far as ought that appeared on a plea  
deft might have stolen them himself, it  
shd have stated they were stolen without this  
default. 21 Co 83 b. 1 Inst 89 a, b, c

I hold in remarking upon this case observed  
that it was a "hard one", I presume least you  
shd be mistaken by it, that he did not refer to a  
decision but merely to the doctrine alone.

Ag<sup>t</sup>. Some have  
taken a distinction, between a sh<sup>er</sup> ag<sup>t</sup> ag<sup>t</sup> by  
a deposit<sup>r</sup> founded on a valuable consid<sup>n</sup>, & one  
of a same kind but without consid<sup>n</sup>. I have  
said that the former binds him as a contract<sup>r</sup>  
but the latter does not. — but this is now en-  
tirely exploded & I think correctly for the mere  
delivery of goods to a man is suff<sup>t</sup> to support his  
prom. — but then if it is a sale or loan — it is Irish  
— it is a null in law, for as soon as the man  
receives a reward he ceases to be a deposit<sup>r</sup> for  
it is essential to the character of a depos<sup>r</sup> that  
he keep goods without reward, if he receives a  
reward he becomes a bailer of a 5<sup>th</sup> class. —  
but this distinction is annulled by auc. & I  
think is also lost upon prin<sup>es</sup>. 2 Ba 241. 2 Ray

— 909. 219. Doct & Stud 129. 12 Mod 487. 3 Ave Ed. 245. b. 294. —

In Southote case it was said that if goods were left with a deposit<sup>r</sup> in a chest of which Bailor kept the key - Bailor was liable only for the chest & not in any event for the goods. - for it was said they were not entrusted to him. But this Lord Holt decides in *Eggs v. Barnard* & says Bailor sh<sup>d</sup> be liable for the goods. - for Bailor has as little interest in them when out the chest as when in it, & has as much power to defend them in one case as the other. Now neither Coke nor Holt notice at all, Bailor's knowledge or ignorance of the articles which are in the chest. - not on equitable grounds nor to vary the case materially - for if he did not know the contents, he might think it as if there was nothing in it, & again what not be extraordinary care of some articles and to gross negligence of others - so that in case of <sup>negl.</sup> ignorance, the extent of his liability will be very doubtful; in fact his neglect of the chest was gross. 4, 20838-4. 3 *cost* 4/8. 1 *Inst* 89a. b. & *Ray* 914. The rule is not settled upon one. & upon this I think deposit<sup>r</sup> must not be liable not knowing the contents of the box - except as above.

It is said above that a deposit<sup>r</sup> or rather, Bailor may subject himself to any extent by a special acceptance. But an unqualified general acceptance to "keep safely" does not subject him at all events, for he will not be liable for inevitable accident, or loss occasioned by a robbery.



Kind of Bail<sup>5</sup> } violence among does - for can not  
not guard ag<sup>t</sup> open violence, but in gen<sup>l</sup>.  
I suppose bailer and subject for L<sup>o</sup>p by theft  
L<sup>o</sup>p & H<sup>o</sup>d 130. 1 Paw. C. 249. 9. Hobg<sup>h</sup>. Jones 62. 75.  
Indeed anw<sup>d</sup>. to the current of auc. & the ap-  
parent grounds on wh they proceed it appear  
some that the Deput<sup>5</sup> is not subject under a  
gen<sup>l</sup>. unqualified engag<sup>t</sup>. unless he is guilty  
of some neglect, - the engagement to keep  
safely is nothing more than an engag<sup>t</sup>. to take  
as good care of the thing bailed as of his own  
goods. -

Of the Commutation. This in English may  
very properly be called lend<sup>g</sup>. & borrowing, here  
the article bailed is to be specifically restored, &  
the benefit of it bailt is for bailer alone - so q<sup>t</sup>.  
he is bound to use more than ord<sup>y</sup>. care, & is  
liable for L<sup>o</sup>p & H<sup>o</sup>d. neglect. Thus if I borrow  
a horse & put him in a stable without lock<sup>g</sup>.  
it & he is stolen I will be liable, but if he  
is locked the stable he will not be liable, for q<sup>t</sup>.  
is more than ordinary care. 2 Ray 915. 1 Paw  
249. 250. 1 Br 244. Jones 91

and it seems that  
when a L<sup>o</sup>p is occasioned by a bare theft with-  
out other violence than that of taking & car-  
rying away the goods, the borrower is prima-  
facie liable & will be subject unless he  
proves more than ord<sup>y</sup>. care was used by him  
Jones 51n. 2 Ray 916.

But on the other hand he is not liable  
when the loss was occasioned by a fire he  
did not maintain, as if the horse was taken by rob-  
bers as contradistinguished from thieves - for  
even does not prevent violence more than  
timidity - But in this case borrower might  
subject himself for the loss, - as by voluntarily  
exposing the horse in a dangerous  
place, so that it would seem to be that if  
borrower is not prima facie liable for  
loss by open violence it are & 1 Bow 251

And the bor-  
rower is not in genl. liable for any of those  
losses or accidents call'd inevitable, as by light-  
ning, earthquakes tempests, inundations &c.  
tho' he may render himself liable by volun-  
tarily exposing the prop. - as by putting the  
horse boarded on board of a ferry boat in  
dangerous weather, whereby he is lost.

And if guilty of a breach of trust he will  
be liable at all events - for then he becomes  
a holder in his own wrong. - as if he borrows  
a horse to go to Hartford & he goes to New  
York - & the horse is killed by lightning on  
the way - for being illegally possessed he  
becomes liable for all the consequences  
of that prop<sup>n</sup>

Or if he borrows a chattel for a limited  
time as for 24 hours - & unnecessarily de-  
tains it for a longer period, he is liable  
in



Kind of Bail } in consequence of the trust  
of trust. - This rule applies to every class  
of Bailment. 2 Ray 915. 917. 10aw 249. 253. 10a  
244. Jones. 95. 6. Bro. 244.

Location & Conduction

This kind of bailt may properly be called  
letting & hiring. - It is the loan of goods for  
a reward to be paid by the bailor or hired  
by it the bailor acquires a transient qual-  
ified prop<sup>y</sup> in the thing bailed & the bailor  
acquires an absolute right to the price  
of loaning - 2 Ray 913. Jones 119. Esp. D. 525.

This bailt being  
mutually advantageous the risk ought  
upon prin. to be equally divided, & ac-  
cording to the genl prin. above, bailor is bound  
because ord<sup>y</sup> case & no more & is liable for  
ord<sup>y</sup> neglect & nothing else. - This I take to  
be the true rule. But in the case of  
Caggs v Bernard 2 Holt remarks, that the  
hirer is bound to the utmost diligence  
but he has in this paragraph contains more  
of the law of bailt - often used long. reg.  
too long and I think he has done <sup>it</sup> there - for  
if the hirer is thus bound, he is equally bound  
with the borrower - who not form an excep-  
tion to the genl prin. & it wd be the only  
one. & indeed Holt himself limits the  
liability of the hirer to be less than that  
of the borrower. - So I think it may safely

said above, that the time is held only for  
at 12 years. See Jones 31. 121. & 149. Sir Wm Jones  
says L. Holt was led into this error by the  
mistranslation of a Latin word.

The time is  
waived prima facie for loss by robbery  
but the presumption may be rebutted  
as in the case preceding.

It was once a question  
under this class of bills whether the bill was  
obliged to keep in repair the instrument  
he had let to him - but it is now settled  
that the bill is to make the repairs him-  
self. 1 Saund 321. 1 Sa 531. Doug 710.

*Pawn or Pledge*  
This is a delivery of goods as a security for a  
debt due from bailor to bailee Jones 5 C. 14.  
2 May 913.

This subject of pawns bears a strong  
analogy to that of mortgages - for if goods  
be delivered upon a contract to secure a debt  
due from pawnor to pawnee it is accompa-  
nied with a right to redem., - no matter  
what are the terms of the contract - it is a  
pawn, - & once a pawn it is always a  
pawn, - as once a mortg. is always a mortg.  
Thus an absolute bill of sale was made &  
it appeared by another instrument that  
the bill was to secure a debt due vendor  
or bailor, & that bailor might sell the prop.?



Kind of Bail. } Prop<sup>r</sup> but removing a right to  
redeem - held to be but a pawn - 144 Me 114.

and this arg<sup>n</sup>  
being advantageous to both parties - as giving the  
pawnee credit & securing the debt to pawnee?  
the p<sup>r</sup> is bound only for ord<sup>y</sup> care & is liable  
only for ord<sup>y</sup> negl<sup>t</sup> - & this is an established rule  
2 Ray 917. 1 Dow 252. Sal 523. Jones 105.

In *Sawthicks* case  
Lord Coke says paw<sup>r</sup> is bound to keep the goods  
as his own, so wd be liable only for gross negl<sup>t</sup>  
& reason assigned is that P<sup>r</sup> has a prop<sup>r</sup> in  
the good pawned - but this is no more than  
every bailor has. - there is no ground for the  
distinction & the rule founded on it is no  
Law 4 Co 83b. contra East & Lush 129. Yelv 172. 1 Sa  
240. 2 Ray 917. Sal 523. Jones 105. 112. 115. In this  
case then the auc<sup>r</sup> abundantly & directly has  
monise with the p<sup>r</sup>. It follows then

that Pawnee is  
seized for loss by robbery, but he may sub-  
ject himself like the true pawn<sup>r</sup> to charges  
of bailor - and in every case in which  
bailor is not bound to more than ord<sup>y</sup>  
care, he is prima facie excused for losses  
occasioned by robbery as contradistinguished from  
care theft. Sal 522. 2 Ray. 916. 7. Jones 51. 107.  
to 111.

In *Sawthicks* case arg<sup>n</sup>, it is laid down &  
pawnee is not bound for loss occasioned by

they can theft because they are bound to keep it  
good as his own he having a prop<sup>y</sup> in  
them. Sir W. Jones holds directly the contrary, ab-  
solutely & unqualifiedly - & for an <sup>equal</sup> reason equally  
strange as that of L. Coke viz. <sup>to say</sup> because we  
cannot be considered as using our diligence  
when he suffers goods to be taken by stealth.  
14 Co 83 b. contra Jones 105-7. - Now it is not  
true in fact that a man who uses our  
diligence cannot suffer by theft, indeed it is  
a question of fact in every case whether our  
diligence was used or not. The contrary opinion  
contradicts all the experience of mankind -  
I shall place this case by theft upon the true  
ground - for the say factors are bound when  
"reason all over" has been used, by Mr. Thomas  
"our own" & Sir W. Jones himself says the same  
thing viz. he is liable for loss by theft unless he  
proves extraordinary care. 2 Ray 918-8. Went 141. Tal  
22. 1 Cow 250. Sir W. Jones himself 92.

The pawnbroker  
like all other bailees gains a qualified inter-  
est in the prop<sup>y</sup> pawned but it is defeasible  
& is determined upon pay<sup>t</sup> or tender of the  
debt. 1 Ba 237. & Cro 944. 4 Co 83 b. Brind 92. Yl  
179. Jones 111. 2 & 3 R. 27.

After then after pay<sup>t</sup> or tender  
a demand of restitution of the prop<sup>y</sup> by the owner  
on the day of pay<sup>t</sup> pawnbroker will continue  
not to detain it, he is guilty of a breach of



Kind of Bailty of, least & of course is liable for any  
loss or injury the Prop<sup>r</sup>. may sustain from  
any cause whatever - as from lightning &c. See  
523. 2 Ray 914. Esp. 2625. 4 Co 436. 10 Bow 253.

On pawners  
refusal to deliver the goods on pay<sup>r</sup> tender &  
demand of restitution, paw<sup>r</sup>. may immediately  
maintain trover ag<sup>t</sup>. him - and the rule  
is the same if the refusal to deliver be by  
the clerk or ag<sup>t</sup>. of p<sup>r</sup>. acting in the p<sup>r</sup>. course  
of his employ<sup>t</sup>. - for qui facit per alium fac  
it ipse. - But if the Clerk &c. does not act  
in the course of his employ<sup>t</sup>. he will not  
render his principal answerable See 8 Co J.  
244. See 441. Moon 244. Jones III. 126.

In this case however p<sup>r</sup>. may  
have his election between trover & a bill in  
re on the p<sup>r</sup>. or implied contract to deliver  
as pay<sup>r</sup>. - viz ag<sup>t</sup>. on & breach of contract. - or trover  
on the breach of trust P. M. C. 172.

But it seems that  
p<sup>r</sup>. cannot maintain either of these ac<sup>t</sup>.s with-  
out pay<sup>r</sup>. or tendering what is lawfully due  
even tho' the pawn was made on an usur-  
ious consid<sup>n</sup>. - because both these ac<sup>t</sup>.s as  
are all ac<sup>t</sup>.s on the case, are founded upon  
equitable principles 15 R 153.

A refusal to de-  
liver the goods pawned on pay<sup>r</sup> tender made  
is an indictable offence at C. L. - but with

with regard to trustee of trust in joint mortgage  
will hold it is not a criminal offence that  
the law affords civil damages. - This rule is  
well settled, and there are some opinions to  
the contrary Dal. 522. Gil 309. East 279. Da 246. &  
Haw 216. This rule is evidently a rule of policy  
for there is obviously nothing more crim<sup>l</sup> in a  
breach of trust between pawnor & pawnee yet  
between any two other contracting parties  
It is intended to guard ag<sup>t</sup> fraud & opp-  
ression for the delivery of a pawn is almost  
universally a secret transaction so that pawn  
has an opportunity of conceal<sup>g</sup>. the evidence  
& ag<sup>t</sup> pawn is usually embarrassed & unprop<sup>r</sup>-  
ous, so that those who allege them have  
virtually the power to compel pawn<sup>ee</sup> to  
submit to their own terms.

1<sup>st</sup> It seems that in  
some cases pawnor has a right to use the thing  
pledged, in others not. And this right when it sub-  
sists is said to be founded on the consent of pawn-  
ee either express or presumed. - But this  
point is doubtful. Now this presumption is said  
to exist or not in joint as the thing pledged  
is likely to be made better, worse, or, not at  
all affected by the use. Examples of the former  
do not often occur, that of a setting dog pledged is  
given by Sir M. Jones, which would be confirmed  
in his habits by use. So if a horse were pledged  
for a length of time as to be kept thus the winter  
it



Pawn { winter it and be good for him to be used  
- but he may be used upon another principle.  
m - Jones 112-3.

It is said too, that if a pledge will not be in-  
jured it may be used - but pawn uses it  
at his peril - as the pawn is equally advanta-  
geous to both parties & the use results to  
the sole benefit of pawnor - he need be liable  
for a loss as all events - - e.g. near & jewels &c if  
stolen &c need be liable - thus the sample usually  
given of articles that will not be injured, but  
it is well known that they will wear out  
in length of time, still the injury is so little  
as not to be noticed by the Law, *de minimis  
non curat Lex*, Lat 522. 1 Ba & 37. B.M. 972. 1 Roll  
308. 672. 1 Inst 29. 2 Ray 917.

And <sup>in</sup> When pawnor is at an expense in keeping  
a pledge he may use it to reimburse him-  
self - as in case of a pledge of a horse or even  
he is obliged to furnish sustenance - &c it is  
as someone entitled upon pain of justice to  
use them by way of recompense, - but I can't  
see how the consent of pawnor can be gained  
there, it auct. 2 Ray 917. 2 B & 225.

I cannot discover  
from any of the books that pawnor is to  
account with pawnor for the use of the  
pledge by the Eng. Law. The Roman Law requir-  
es him to account Jones 115.

But when the

The pawn will be injured by the use of the  
keeping of it is not expensive, pawn is  
not at liberty to use it - can of course be  
slighted. Nowhere it is said there is no con-  
sent presumed on the part of pawn, but  
I doubt whether the law refers at all to that  
consent or want of it, for pawn's duty is  
to keep the pawn & return it to p<sup>r</sup> when  
the debt is paid - & if he still use it, it is  
a doing what he was not licensed to do  
& he is exposing himself to the inju-  
ry of pawnor. L Ray 917. B. N. 679. Jones 113.

as to the pawn in  
these cases has no right to use the pledge, if he does  
use it he is ipso facto guilty of conversion & liable  
to an a<sup>c</sup> of trover by p<sup>r</sup> immediately, - for in the  
law of trover unlawful user is ipso facto a conver-  
sion 1 Da 256.7 - so that pawn need not wait un-  
til the day of pay<sup>t</sup> arrives.

The law respecting pawn  
is said by L Holt to be applicable to goods found in  
gins. The liability of finder is the same i.e. he is  
bound to the same diligence - but he has not  
the same right to the prop<sup>y</sup> that p<sup>r</sup> has. Cow.  
says the same thing L Ray 917. Bow 252.

There is a case  
in Cro. E 219 in wh<sup>ch</sup> it is said the finder of goods  
is not obliged to keep them safely & is not at  
all liable for a negligent loss. - The dictum is  
not law, & says it is but a dictum, - the decision



Clawson's decision, <sup>of course</sup> however is a correct one  
also. Ex. 2399. 2 Bulst 21. 1 Leon 123. 1 Da 243.

Now upon the first impression it  
would seem that the finder ought not to be  
sued except for gross neglect - as the owner  
except of his possession accrues to the owner &  
finder cannot compel the owner to pay for  
the trouble &c. - The finder then apparently  
stands in the place of a depositary, - but it  
is not his character in case of a deposit of  
valuable to transfer the property at his pleasure  
he requests the owner to take them - & knows  
to whom he delivers them - who is not the  
case when goods are lost - & found - so that  
finder should either take out care or leave the  
goods where he finds them that they may  
come to more careful hands. (or none.)  
In law, the finder is required by law to use  
out care, which also allows him a recompense  
for all this trouble & expense; so that  
the advantages to both parties are equal  
with the first principle will then take effect  
Ex Con 835-6. - and this I think is also the  
rule, the dictum in Ex E is contrary  
The case in Ex E was this. A found a  
quantity of butter belonging to D. & appeared  
it to a justice of the peace. Rep. B. to take  
care of him, & the Ct held & I think rightly that  
the action did not lie, for conversion is of the  
gist of the action - & it will not lie for a mere

more misfeasance - the reason? only in this case  
is *Laid. Bro 6219 3 Co 145. 3 Burr 282; 4 Bro 251. Esp.  
D 596.*

It is well settled at *Cal.* that the finder of  
goods has no lien upon them for his trouble  
& expense, but upon demand by the true  
owner he must deliver them up, & if he  
refuses to deliver them upon reasonable  
evid<sup>ce</sup> of ownership he is guilty of conversion  
& liable in an ac<sup>ti</sup>on of trover *2 Bl 1117 2 Wms 254  
Ld 551.*

In case of salvage the rule is diff<sup>er</sup>ent.  
- When goods are wrecked, abandoned or are  
found in a dangerous situation at sea & are  
saved by a 3<sup>d</sup> person the person saving them  
is entitled to salvage, but this is by the *Mar.*  
*Law of Nat<sup>l</sup> & not by the Munt. Law.* *2 Ray  
293. 2 Wms 254 5 Oia 270.*

But tho' the finder of goods  
has no lien upon them it has been made  
a moot quest<sup>ion</sup> whether there is any way  
in wh<sup>ch</sup> he co<sup>uld</sup> recover a recompense for his  
trouble & expense. If he can do it at all it  
he must do it by an ac<sup>ti</sup>on of indeb. ass<sup>ess</sup> for  
work & labour done &c. on an implication  
of a promise & request now the law will  
imply a prom<sup>ise</sup>. But not a request for that  
is no privity between the parties - for the act  
of finder is an act of voluntary courtesy &  
there is no contract. - I can find no prin.



Pawn } principle of the O.L. on wh this rule  
seems to be founded 2 Wylk 56, as to vol. courts  
see 110. Exp D 89. 95.

But a refusal by finder  
to restore the goods to owner on demand is  
not of course a conversion, it is not so un-  
less the owner exhibits reasonable evidence of  
ownership - for otherwise he will be obliged to  
deliver the goods to the first man that applies  
for them. If this evid<sup>e</sup>, the finder must  
himself let the judge whether it is reason-  
able or not. If upon his refusal of it they  
come into Ct. it will be referred to the jury  
included in the issue, to determine whether  
reason<sup>e</sup> evid<sup>e</sup>, was exhibited - or not. 2 Bulst  
309. Exp D. 590.

More. But there is a case wh as far as I  
can discover has not been decided in the  
Eng, Ct., it is. A. finds goods wh actually belong  
to B. B. however claims them, & upon A's  
refusal to deliver, sues him in trover & by  
means of false testimony recovers their  
full value. B. afterwards demands them of  
A. who refuses to pay for them having now done  
it. B. then brings his act<sup>n</sup> agt A. can he  
recover - see analogies 3 F.R. 125. 2 Ba 11.  
Dang 101. 1 Wylk 669. 682. 2 Ld 408. 1 Root 445. see  
decision Broot. Rep. Ba.

We return ag<sup>n</sup> to the  
relation of Pawner & Pawnee. If upon

upon tender of pay<sup>t</sup> by B. A refusal to  
redim the pledge by B. B. moves in  
trow. B. may still recover what was due  
to him upon the orig<sup>e</sup> contract, but he must  
first make demand of the money lent.  
1 Bulst 29. 31. 1 Da 238.

If perishable goods are the  
pledge & decay the B. does not loose his  
debt. But he may sue A to recover it, for the  
pledge is not a pay<sup>t</sup> of the debt, it's de-  
struction then, of course does not extinguish  
the debt. In debt in most cases it would be  
injust to make the one a set off for  
the other, as sometimes the pledge is not  
of half the value of the debt, & at other is  
of double that value. But by means of the  
mutual remedies complete justice is done.  
B. may recover his debt, notwithstanding  
discrepancy. & A may recover his pledge  
on pay<sup>t</sup> & for the loss if it has been injured.  
1 Cal 23. 1 Inst 209. 4 Geo 179. 1 Da 238.

And while  
the pledge remains unimpaired in the  
hands of B. he may sue for A to recover  
of debt unless there was a special agreement  
to the contrary, i.e. that B. should rely solely upon  
the pledge for his debt. - 1 Sta 919. 4 Geo 179. 2 Ldott  
Cap 286.

If the debt for which the goods were pledged  
is not paid on the day appointed for pay<sup>t</sup>



30  
Pawnee { prop<sup>y</sup> they it law become absolute the  
pawnee. The legal title of p<sup>y</sup> is gone forever  
but he has in analogy to the law of mortg<sup>e</sup>  
a right of redemption in Equity Sheph. Touch  
105. 1 Inst 205. 2 Vern 691. 695. 3 Atk 395.

It seems to me however that this right of re-  
demption is to be enforced only when the prop<sup>y</sup>  
remains in the hands of the p<sup>y</sup> or is as-  
signed by him as a security for a debt. - for the  
prop<sup>y</sup> in the pledge becomes absolute in the  
pawnee on failure of p<sup>y</sup> at the day ap-  
pointed, & it is an essential quality of this  
absolute prop<sup>y</sup> that who have the right of  
alienation, is therefore should not be redeemed  
from the hands of a bona fide purchaser

But there is  
a diff<sup>r</sup> between a pawn & a mortg<sup>e</sup> of a  
personal chattel - for with regard to a mortg<sup>e</sup>  
mortg<sup>e</sup> has no equity of redemp<sup>n</sup> after for-  
feiture - the mortg<sup>e</sup> is consid<sup>d</sup> as a transfer<sup>r</sup>  
of property & not as merely a mere lien like  
a pawn. 8 Johns 96. 96. 5 ib 258. 1 Wey 358

But in  
case of a pawn the eq<sup>y</sup> of redemp<sup>n</sup> exists after  
forfeiture, even tho the parties agreed that  
if the money was not paid on the day  
the sale should be consid<sup>d</sup> as absolute - & this  
is on the max. even a mortg<sup>e</sup> always a  
mortg<sup>e</sup>. 2 Vern 698. 1 Br 298. 1 M & K 114. The mean<sup>g</sup>  
of this is, that when prop<sup>y</sup> is transferred as

as a security with a right of redemption in the  
equity. That it shall be consid<sup>d</sup>. as <sup>an</sup> absolute  
sale shall not take effect - this is to protect  
the appraised ag<sup>t</sup> and a concessional condition.

A Factor cannot pawn the goods of his principal so as to give him any lien agt the Prin<sup>al</sup> or the Part<sup>l</sup> & Lent<sup>l</sup> Agent. The reason of this is that the factor himself has but a lien - which is a personal right & cannot be transferred with the creation of a lien is a fiduciary contract. And tho the Prin is willing to give his factor a lien upon his goods until their accounts are settled, still he does not allow him to select a new keeper for them. If the Factor does transfer the goods of his Prin. the rule now is that the Prin<sup>al</sup> may maintain trover for them agt the pawnee without even tendering to the Factor the balance of their accounts. - For the act of factor is a breach of trust, & amounts to a forfeiture of all the rights he has & all he cd create Lta 1178. 50 R. 504. 1/2 BML 362. 1/2 East 5.

On failure of payt. by D. at the day appointed  
D. is at liberty to sell the propy - for at law the  
legal title becomes absolute in him. Inst 205.

to some opinions he may sell or assign. the price  
before the day of pay<sup>t</sup>. Dec 12 4. 1 Dec 29. 21. 1 Dec 29



Pawn, & assignee cannot be correct. Now every bailt implies a contract strictly fiduciary. Muller says a lien is a personal right & cannot be transferred to another. La Cumberough says the same thing, & this doctrine is also inferable from the cases in *Felt & Co v J.* - *July 1788. 800 J. 244. 5 D. 606. 1 East 6.*

Now the practical consequence of a decision of the point one way or the other is very important - for if, *p<sup>r</sup>* cannot assign the pawn before the day of payt - it follows, that if he does so, it, *p<sup>r</sup>* need not tender payt to *p<sup>r</sup>* but may claim immediately of him.

analogies will not support the contrary opinion. Now a pawn cannot be forfeited by the felony of *p<sup>r</sup>* & this is well settled, but, by such an offence, the offender is capable of forfeiting, whatever he is capable of conveying in his own right time it follows, the pawn cannot be assigned till after the day of payt - that the pawn cannot be forfeited see 1 Ba 238. - that what he can convey is liable to forfeiture see 1 Inst 8. 12 Co 12. Cro C. 556. 2 Ba 376. &

It is also said down by *Brooks* in his abridg. &c. he is right and that the pawn cannot be assigned see 1 Va 359. 1 Ba 238.

As it is well settled that a pawn cannot be taken in return for the debt of *p<sup>r</sup>* i.e. it cannot be assigned by operation of law, now *p<sup>r</sup>*

this furnishes a strong analogy to the rule if  
it cannot be assigned by the acts of the parties  
the reason why the pawn cannot be taken  
in Exec<sup>n</sup> is that the pawnor might be injured  
by it, & 1 Pa. 208. 352. 2y 68. Bro 124.

These analogies united to the Main Prin<sup>l</sup>  
are upon the point seem satisfactory, that  
the pawn cannot be assigned before the day  
appointed for payt. and the pawn is repaid  
is a per then. Now if p<sup>r</sup> has a right to assign  
if he sh<sup>d</sup> become a bankrupt, p<sup>r</sup> wd be sub-  
jected to the danger of a loss - for the supposit<sup>n</sup>  
that p<sup>r</sup> ed assign absolves him from all  
liability to p<sup>r</sup> for the pawn.

The case of a mortg<sup>r</sup> is diff<sup>t</sup>, than the  
mortg<sup>r</sup> can assign his interest but then  
the land mortg<sup>d</sup> cannot be run away with  
or embezzled & no fraud or artifice of mortg<sup>r</sup>  
can prevent mortg<sup>r</sup> from redeeming. Whereas  
in case of a pawn the prop<sup>r</sup> & thing personal  
may be embezzled &c.

There is a case in 2 Dom wh<sup>ch</sup> wd seem to im-  
ply that p<sup>r</sup> might assign before the day of payt.  
- but this is not so, the case was. A pawned  
goods to B. who assigned them to C. on a bill  
in A. by A. & A. <sup>to redeem</sup> it was decreed sh<sup>d</sup> pay C.  
the money he had paid to B. Now here it  
is to be observed the bill was bro<sup>t</sup>. after for-  
feiture so the equitable claim of the op<sup>r</sup> is  
the same, as if the assignt. had been made after.



Paupers after forfeiture - In order to have raised this question in that case it should have appeared that the tender was made on the day appointed for payt. 2 Dem 91 13. 1799.

On the other hand p.<sup>r</sup> may forfeit his right to the pawn by his crimes &c. & he may also assign his interest; but in such cases of forfeiture & King or Pub. cannot take the pawn from p.<sup>r</sup> without paying him the debt. - for now the Pub. stand in the place of p.<sup>r</sup> 1 Bra 238. 1 Bulst. 29. Gilv 49. - I trust then from all that has been said upon this subject that the pawn cannot assign & slide before forfeiture -

It was at-  
tending deemed essential to a pawn that it should be delivered at the time when the debt in-  
tended to be secured by it accrued, if it was given after & time it was not a pledge but with-  
holding a lien and not secure the debt of the  
it - but this is not law. - the rule is now  
well settled that the pledge may be delivered as  
well after the day as on that on which the debt ac-  
crued. 2 Leon 20. 1 Bra 238. 9. Gilv 164. 1 Pegg 350. 359. O.M.P.  
35. 1 Bulst 68.

It was formerly doubted where there was no day of payt appointed, whether payt. or tender of payt. by p.<sup>r</sup> would vest the prop. in him, unless it was made during their joint lives. But it is now settled that the

he may redeem at any time during his  
own life altho. pawn is dead. but to  
this doctrine there are some contrary opinions  
12a 289. 1 Bulst 129. 1 Glt 178. contra 12445.

And a question  
has been made whether, in case of one day  
being appointed for payt. p<sup>r</sup> should assign  
the pledge to p<sup>r</sup> for anal. consid<sup>n</sup> dur<sup>n</sup> his  
own life, he (p<sup>r</sup>) must tender payt. to the  
Ex<sup>r</sup> of p<sup>r</sup> as to p<sup>r</sup> of p<sup>r</sup>ignee. Now this dep.  
ends entirely upon the quest<sup>n</sup> p<sup>r</sup> whether  
p<sup>r</sup> has a right to assign before the day of  
payt. or p<sup>r</sup> has a right to redeem at any  
time during his own life - if the pawn is  
assignable payt. shd be made to p<sup>r</sup>, if it is  
not assignable payt. shd be made to the Ex<sup>r</sup>.  
In my view of the subject is correct payt. must  
be made to the Ex<sup>r</sup> of p<sup>r</sup> and not to p<sup>r</sup>. 1 Glt 178  
1 Bulst. 28.

No time of payt. being fixed by the  
pawn may be redeemed by p<sup>r</sup> or tender  
at any time during p<sup>r</sup> life, but p<sup>r</sup> cannot  
afterwards claim redemption at law  
for after forfeiture there is no legal claim  
on the part of p<sup>r</sup> or his Ex<sup>r</sup>. 1 Bulst 29.  
1244. 1 Glt 178. 12a 289.

The rule fixing the term  
of p<sup>r</sup> life as the period of redemption is now  
giving a positive over the same limitation  
ought to be fixed for justice to p<sup>r</sup> & p<sup>r</sup>ignee.



Plains. } concerning;

That, when the law thus limits the time of redemption to the death of p<sup>r</sup>. State is then is still a right of redemption in Equ<sup>y</sup>. unless there was a special agreement to the contrary - there is no objection to this rule but it is reasonable, & I trust it is laid, 10a 239m.

When a day is appointed for the pay<sup>t</sup> of a debt, the p<sup>r</sup>'s right to redeem is not forfeited by his death before that day, but the right refers to the rep<sup>y</sup> of p<sup>r</sup> - the death of p<sup>r</sup> in this case is not the contingency on which the p<sup>r</sup>'s right to redeem depends. 10a 239, 10a 239.

The fifth class of Bailm<sup>t</sup> is, the delivery of goods to another to be carried or for some other act to be done about or concerning them for a reward to be paid by bailor, this includes on the one hand a delivery to a private carrier or other private person or on the other hand to a person exercising some public employment, as to a common carrier, or a warehouseman. 2 Ray 917-8. Jones 182. 193.

1<sup>st</sup> Delivery of goods to a private person to do as to carriers, taylors, sailors, factors, brokers, commission agents, or clerks, &c. Now a delivery to one as a private sailor may be either to one in his private or professional character, or to one as pursuing his private employment. 2 Ray 918 Jones 80. 1289.

This class also include a delivery to an agitating farmer, i.e. to a person who pastures cattle for another, - here is a bailer provided he has the care of the cattle, Jones 89.

You observe that in this case the bailer is advantageous to both parties the consequence of which is, that the bailer is bound only to ord<sup>y</sup> care & is liable only at neglect & nothing else - & as the Law is settled both by case & principle 1 Roll. 2 May 915. 1 Dow & 254. 12 Mod 487. 1 Vent 121.

A private bailer of this class of bailer is prima facie excused for a loss by robbery, but the rule is to be qualified as in the cases of the hirer & paid - but he being in no fault in exposing the prop<sup>y</sup> he stands excused. Jones 129, 130, 138.

The rule is the same as to all the private bailers of the fifth class of bailer when any <sup>other</sup> violence has occasioned the loss as to legions, thieves, agents, ship masters, factors, brokers, auctioneers, agitating farmers &c &c. 1 Inst 29a. 2 Ray 915. 121. 1 Co 34a.

In case of a loss by larceny theft, bailer is liable or not avoid<sup>y</sup> as he omitted or not ord<sup>y</sup> care. - prima facie I presume he is liable as in all cases when the advantage of bailer is equal, as to this point Mr. Jones contradicts himself - The question whether ord<sup>y</sup> care was used or not, is a question of fact for the consideration of



Priv. Car. } of the jury 2 May 9/15. 10 Dec 1816. 2 Dec 1816.  
1804. Jones 158.

If the prop. failed or was restrained by  
tailor's landlord for rent, & sold - as may be  
done - & thus becomes <sup>lost</sup> to tailor, the tailor  
is liable, for it is at least a want of an <sup>8</sup>d,  
care to suffer the prop. of another, to be  
taken instead of his own for his own debt.  
Jones 141-2. 3 Old.

And this rule is doubtless applicable to every  
tailor who keeps or carries for a compensation  
as a Taylor - & I suppose it is applicable to  
all cases, in wh. the tailor is equally advan-  
taged to both parties.

If silver & gold is delivered  
to a smith to be made into an utensil of any kind  
Sir W. Jones says it is a mutuum & not a bailment  
hence accord. to his opinion, the silver, vest also  
being in the smith, & if it is lost by any means  
whatever he bears it Jones 89. 143.

And hence also he holds that the smith  
may use the silver for any other purpose, if  
he but returns to the owner giving him the silver  
an equal quantity of the same standard. - Now  
if one of these propositions is true I doubt  
not but the other is. - Determining on wh.  
this is founded is, that by the terms of the contract  
either express or implied the form of the prop.  
is to be retained by fusion, if it cannot afterward  
be identified, and if it cannot be identified it

it cannot in legal judgment be specifically retained, & if so there was no intention it should be specifically retained. & if so it cannot be a bailment. And this reasoning is founded on the analogy of wine used to being made out of the grapes or flour of another &c. 204. (Page 35.)

It seems very difficult to deny the correctness of this technical, artificial reasoning of Sir Wm. & still I never could be satisfied with it. - The intention of the parties is that this silver shall be fused & this fusion does destroy its identity. Now if a top accrues - as being destroyed by lightning - & it is ascertained that the prop<sup>y</sup>. destroyed was the same, I can see no reason why the tailor should bear the loss, the smith having used an<sup>d</sup> care the contrary rule bears with extreme harshness upon that class of people - & if the prop<sup>y</sup>. remains as delivered until destroyed, there is much less reason the smith should be subject. I cannot say that I have any divided opinion as to this point. It seems to me, that a lot of justice will not throw such a burden upon the tailor as <sup>see</sup> the rule of Sir Wm., merely by the force of technical reasoning.

When the bailment is to a person to do some act of skill in his professional business, for a reward, the law implies on his part a twofold contract viz, that he shall not only keep & redeliver the prop<sup>y</sup>. but



Given Carriers } but also will do his work skilfully

But if the act to be done is not professional or  
law implies no engagement, that the work  
shall be done skilfully, but it does that he  
will return it, bailor in this case then is  
not liable for the quality of the work un-  
less he expressly contract to do it with skill, as  
if a man were deliver cloth to a blacksmith  
to be made into a coat, - this is upon the  
unexcused maxim, the Law will not as-  
sist fools & Lazzards. 1 AML 168. 11 Co 54. 3 Bl 165. - G.  
1 Saund 324. Esp. D. 601. Jones 128. 9. 127 & 146.

If goods be-

livered to a bailor of this 5<sup>th</sup> class, are lost or  
destroyed, by his neglect of that degree of care  
and of law requires, & before his work was done  
I do not find that the law allows him wa-  
ge for what he has done - This has been made  
a quest. but I can not see why; - for bailor  
is certainly liable for the loss - in conse-  
quence of whose could perhaps too bailor derive  
no benefit of his labour? - surely surely bailor  
has caused no benefit to bailor, who can sup-  
port the claim, see quest 3 Out. 1592. 5. Esp D 66.

2<sup>d</sup> If delivery of goods to persons & receiving  
a public employment.

1<sup>st</sup> Common Carriers. or

com. car. is any person in genl. who carries goods  
of another for hire as porters, waggons, ferry-  
men

freemen, freemen, ship-master, &c. &c. Jones  
144. 151. 4884.

It was formerly doubted whether any other  
than car. by land fell within the definition  
but this doubt is now removed, & it makes  
no diff. whether the transportation is by  
land or water. 106 17. 18. Cas 1338. 12 Mod 48.  
This law was first extended to com. freemen  
by in the time of Jac 1<sup>st</sup>. & to ship-master in  
the time of Car. 2<sup>d</sup>. Jones 144. 151.

The owner of a ship  
employed in carrying the goods of others are  
considered as com. car. & in case of a loss of  
a<sup>n</sup> may be butt. agt either the master or owner.  
144 18. 156 18. 78. 3 Lev 259. 6 Ark 61. 1 Show 29.  
101. 206 2. 623.

There is a st in Eng 4 Geo 2<sup>d</sup> limiting the  
liability of the owner to the value of the ship  
& freight, when a loss has been occasioned by  
the misconduct of the master or mariners -  
but this is a mere local regulation 18 R. 15. 78.

If a com. car.  
having conveniences to carry goods - they being  
offered to him together with his wages, if he  
refuses to carry them, he is liable in an ac<sup>n</sup>. on  
the case, for him offering them - for from his  
pub<sup>l</sup> employment the law implies an  
engagement on his part, to carry goods for  
any man who will offer them. - the law  
will not indulge him in his caprice, he



Comm. ~~Commissary~~ is ~~in~~ <sup>in</sup> the situation of ~~an~~  
super in this respect, who is obliged to lodge  
all who come to his house, if he can do it.  
1 Br 344. 2 Br 49. 2 Pl 166. 2 Show 82.

But the com.  
carrier is at liberty to make a ~~speci~~ <sup>speci</sup> ~~al~~ <sup>al</sup> ~~acceptance~~ <sup>acceptance</sup> as that, he will not  
be answerable for goods, jewels, money &c un-  
less he is informed of their being contained  
in the parcels or boxes & is paid accord-  
ing to their value. & this is a reasonable rule  
for the greater is their value, the greater is his  
liability, & he sh<sup>d</sup> know what he carries  
that he may know how to apportion his  
care &c. But the law will not allow him  
to impose unreasonable terms, as that he  
will not be liable for neglect or robbery &c  
for this amounts to a stipulation for allow-  
ance to be villainous & But 2 L 98. 2 Pl 622.

est a  
late supressor of this state, one of the own-  
ers of the line of stages between N.Y. & N.Y.  
was subjected to a large amount for the con-  
cupescence of his driver. Since this determi-  
nation the owner has given public notice  
that he will not be liable for the con-  
cupescence or neglect of his drivers - now I take  
it such notice will not avail him at all  
for he might as well advertise that he will  
not be liable for his own neglect &c.

The bait in case of a comm. car. lying avo-  
untaneous to both parties, the car. ind. men  
the nothing to impede the operation of the  
rule, be bound only to ind. case & liable for  
nothing less than ind. negt., & this appears  
to have been the rule so late as the time  
of Hen 8<sup>th</sup> - he was then held not liable  
for robbery Jones 144.

In the time of Eliz it was settled that robbery  
was no excuse. 4 Co 4a 1 Ro 4. 1 Da 345. Jones 144. 5.

And the rule now is that he is liable for  
losses occasioned in any way except by the  
act of God, of public enemies, or of the tailor  
himself - this you will perceive is a  
rule of policy 2 Ray 918. 1 ER 27. 1 East 609. 1  
Paw 253. Dal 18. 1 Will 281.

The true foundation of this rule I repeat  
is pub. policy, & it works an exception  
to the gen. rule, accord<sup>g</sup> to wh. he wd be bound  
only to ind. case & liable only for ind. negt.  
& nothing less. But in all commercial trans-  
actions, great confidence is reup<sup>d</sup>. - & for the  
furtherance of these concerns, it is reup<sup>d</sup> there  
shd be such a class of men as the comm. car.  
their opportunities for fraud & all breaches  
great, & the possessions of strangers must often  
come into their hands, it is therefore reup<sup>d</sup> that  
the Law be very strict, to guard ag<sup>t</sup> their villainy  
& their combinations with robbers & knaves 2 Ray  
918. East 618. 1 ER 24. Dal 143.



Com<sup>m</sup> Car<sup>r</sup> }

in Southwicks case. I take

says the com. car. is liable to this extent because  
he receives reward for carrying 4 C & 40, now  
it is clear this is not the reason, for it is  
extent to every class of bait in which the ad-  
vantage to both parties was equal. It is  
true that the com. car. is not liable unless  
he carries for a reward. indeed in such case  
he would not be a com. car. & of course not  
be subject as such. so to say his degree of re-  
sponsibility arises from his receiving a reward  
is saying it arises from his being a com.  
carrier. 1 Bar<sup>t</sup> 485. 1 Ex<sup>t</sup> 604, Ex<sup>p</sup> D 621

You perceive then  
that the com. car. is in the nature of an in-  
surer against all events except the act of God  
of the pub. enemy, or of sailors. By the act  
of God is meant any act not ed. not hidden  
thru the agency of man - it is synony-  
mous with inevitable accident, 1 BR 33. Shaw  
126. Fire occasioned otherwise than by  
lightning is not deemed as arising by the  
act of God. 1 BR 24, 2 BR 113, Ex<sup>p</sup> D 620.

And it has  
been determined that a com. car. by water  
is not liable for loss occasioned by a rat  
boring a hole through the ship. Sir  
St. Jones says, that letting the rat know is  
the want of ord<sup>r</sup>. care, but experience proves  
the contra 1 Wils 281. B & D 70. Jones 147.

A com. car. is not excused for a loss occasioned by  
a mere mob (or of robbers), for they are not pub.  
enemies within the rule, but if by Pirates he  
is excused for they are the pub. enemies of every  
community 1 Vent 229.

But he is not excused by what are called  
fresh water pirates i.e. such as infect & rob  
in harbours & rivers 1 BR 18. 1 Vent 192. 1 Mod 85  
Esp D 620.

If in consequence of a tempest it is  
necess<sup>d</sup> to throw goods over board the carrier  
is excused, for the necess<sup>d</sup> of such arises from  
the act of God, tho' the immediate act was  
that of the car<sup>r</sup> 2 Rol 567. 1 Rol A 79. 2 Bulst 280.  
Jones 151. Esp D 620. see however a case in Allen  
93. where a com. car. was sued for a loss of pack-  
ells wh. he threw overboard in a storm, &  
was subjected in consequence. The report of  
the case is loose but I infer from it that  
he was subjected in consequence of the box  
being so light, that it was unnecess<sup>d</sup> to  
throw it overboard.

When goods are thrown over-  
board from necessity, the Master, Gunners,  
Sailors & Passengers, must average the loss  
among themselves accord<sup>g</sup> to the rule of 4  
L<sup>d</sup> Mes. - it is not properly a C.L. rule wh.  
prescribes it the average 2 BR 124. 5. 1 East 220. See also  
L<sup>d</sup> Mes. 148. 2 BR 1107.

But if the com. car. vol<sup>g</sup> & passes  
the



Com. Car<sup>rs</sup> of the prop. to danger from the act of  
God & doubtless also from the act of such en-  
emies, he is not excused, as if a hogman on  
ship-master should not put horses in very tem-  
pestuous weather without a top, or should  
if a top should ensue. He would be held liable, either  
if immediate cause of loss is inevitable acci-  
dent. *Shaw 128. Williams v. Ford 1 or 2 Conn. Rep.*

The car<sup>r</sup> is  
also excused accord<sup>g</sup> to an exception to the gen<sup>l</sup>.  
rule when when the ~~act~~ loss arises from  
act or default of bailor himself, Thus when  
an ar<sup>r</sup> was bot<sup>d</sup> agt com. car for the top  
of a pipe of wine, & it was found the pipe  
burst from fermentation of the wine  
the car<sup>r</sup> was not held liable, - for it was  
the bailors own fault in sending the wine  
when in a state unfit to be moved, in.  
*B. & O. 69. 74. Esp 2621.*

So when the car<sup>r</sup> waggon was  
full & the bailor forced his goods upon the  
car<sup>r</sup>. & a top ensued, the car<sup>r</sup> was excused upon  
the above ground. *Shaw 127. 100a 244.*

In order to  
charge the car<sup>r</sup> to the extent of the rule, the  
goods must have been lost while in his po-  
session, or under his immediate charge &  
control, - for if a owner of goods sends a L<sup>o</sup> with  
them in the hope to take charge of goods  
& does take charge of them. If they are stolen &c

He. of car. is not liable i.e. as such, for faulting  
if the loss was occasioned by any act of his or  
of the movinen, he wd be liable, B.M.P. 70. 2.  
Show. 324. Sta. 690. 1 Da 344.

But when goods were taken  
to a com. car., & a passenger was requested by  
the owner, to take the oversight of them, the  
car. was adjudged to be liable for the loss. - First  
request was made to the passenger did  
not deprive the car. of his power of them  
1 Dal. 2. Cas 330. 2d ed. 17.

And it seems that a car.  
tho ignorant of the contents of the box or  
at he carries is liable, <sup>for goods</sup> in case of a loss unless  
he has discharged himself by a qualified  
acceptance. B.M.P. 70. 2d ed. 128. Sta. 145. Carth 485  
Jones 148. Wda 345.

And similar to this you recollect was laid  
down as to the depository, & was questioned  
this case differs from that. - as here the com.  
carrier acts for the mutual benefit of him-  
self & bailor & again his liability does not  
depend upon his degree of care or neglect  
& it is his duty, if he is not willing to take  
the risk, to make a qualified acceptance

And it  
has been twice decided that the com. car. is liable  
even tho informed by the owner as to  
the contents of the parcels, if he secondarily  
accepts and stores, In both these cases the



Com<sup>r</sup> Garrison } The misrepresentation was the result  
of fraud; the 1<sup>st</sup> was a box containing money, & car.  
was told it contained goods of mean value, &  
the 2<sup>d</sup> he was told it contained a book & some  
tobacco. 1198. 1400. 2288. B. N. D. 70. 1 Ba 345. 3.  
Hull 135. East & Lind. 132. Now it is to be obse-  
red that in the latter of these cases the owner  
diminished the value, to diminish the price  
of carrying. - But both are as I think directly  
contrary to spirit, & their rule has been much  
shaken by the opposition of L. B. King & Wm.  
Field, whose opinion was that the car<sup>r</sup> ought  
to be released on account of the fraud, & it  
and require but little care, to suppress them <sup>former</sup>  
entirely. 4 Burr 2500. 1 East 611. Jones 148. 1 Ba 145.

For the purpose

of making a final account it is not ne-  
cessary there should have been a personal com-  
munication between the parties, a notice  
in a public news paper of the car<sup>r</sup> on which  
the carrier, carries goods may be sufficient  
say "may be" - for it may not be sufficient. The  
notice here does not subject the car<sup>r</sup>. But  
it will go to the jury as evidence of the fact  
if the terms of notice are not complied  
with - & if the jury think the owner had  
seen the notice & they will find for the  
carrier. 4 Burr 2298. 2 Ba 485. B. N. D. 71. 1 Ba 298.  
85 N. 531. 2 Ba 622.

where? to the rules laid down the com.  
car. is liable except in cases of fraud, for all he  
receives under a genl acceptance even tho he is  
ignorant of their nature, but when his ac-  
ceptance is qualified he is liable only for what  
he undertakes to carry, i.e. only as far as his re-  
ward extends. Thus when a bag contained £400  
was delivered to a car. & the owner told him  
it contained but £200. - & a loss ensued, the  
car. was held liable only for the £200. - he was  
paid for carrying only the £200. Carth 485. B.M.  
P. 70. 71. Esp D 611.

And when a com. car. had given  
pub notice that he wd. not be answerable  
for certain small articles except upon  
certain conditions, the p<sup>l</sup>ff not complying  
with those cond<sup>s</sup> the deft was held not  
to be liable at all. Thus, Com. Car. wd not  
be liable for money unless he was informed  
of the amount, - the owner misinformed him  
and was held not to be liable at all, this can dif-  
fer from the former, as in that the liability  
was for the amt he was ~~to~~ for carrying -  
B.M. 298.

The master of a stage coach who receives  
hire for passengers only & not for baggage is  
not liable as a com. car. - but if he carries  
goods &c. he is liable as a com. car. Com. Rep 25.  
Lal 282. B.M. P. 70. Esp 201 Q. 524 & Shaw 125. 1 Ma 344.

And a Com. Car. is, liable



Comm. "Carriage" liable accordg. to the distinctions al-  
ready taken whether he is paid before hand or  
an express promise is made to pay, or not.  
for if there was not promise made, he can  
recover his hire on a quantum meruit 1 De  
343m. - But the car. is not bound, to carry,  
the goods until tender is made of his hire -

To charge the  
comm. car. it is not suff. that the goods shd be  
lost while in transitu, i.e. while on the road  
or moving. For if they are lost at an inn where  
he stops he is not liable, he in such case  
is clearly liable if it is an established custom  
for him to deliver to the consignee. & if there  
is no such custom he is liable until  
the goods are delivered to him, - so that prima  
facie he is liable in both cases. - The onus  
prob. of a custom lies upon def. 2 Bl 915. 3 Wils  
429. Raven 54. Esp D 623.

But when it is the cus-  
tom of the business not to deliver the goods  
to the consignee, but to store them in a  
warehouse; the car. is discharged of his  
liability upon his delivering them to be stored,  
and if the warehouse belongs to the car.  
he is not liable, after they are deposited, to  
acc. th. he may be in another character  
1 D 541. Esp D 623.

If consignee of the goods directs  
by what car. yt shall be sent, he is not the un-  
signor

consignor shall regularly bring the ac<sup>ty</sup>  
the car. As if I send to a merchant at N.Y.  
to send me goods by C. & he does it & a  
loss ensues, from freight of C. & I am him for  
I am the carrier, take the risk & the merchant  
acts only as my agent. 8 B.R. 330. Cond 294.  
B.N. 865. Ward 2949, 353. Esp. 2596.

But when the con-  
signor selects his own car. the right of ac<sup>ty</sup>  
is in gen<sup>l</sup> in him, for in such case there  
is no privity between con<sup>ee</sup> & car<sup>ty</sup> as there  
is in the former case

and it seems also that if the consignor takes  
the risk by agreeing for the price of carriage  
he may maintain the ac<sup>ty</sup> altho the con<sup>ee</sup>  
selected the carrier. 5. Bur 2680. 5 B.R. 59. & ibi  
399. -

As to the joinder of parties when there are  
several con. car<sup>ty</sup> see 1st Pleas & 1st 2; &  
also for the manner in which to take advantage of  
a nonjoinder, & see also. 2d 440. 5 B.R. 651. Esp 2  
523. 5 Bur 2611. 2644.

A C. L. a post. master, not be<sup>ing</sup>  
an officer appointed by law was consid<sup>ed</sup> as a con.  
car. & adjudged liable as such, but since the  
establishment of a Gen<sup>l</sup> Post. Off. & the suppress-  
ion of priv<sup>ate</sup> post by the St 12 Car 2<sup>d</sup> he  
has been consid<sup>ed</sup> as an executive officer of Govern-  
ment, & not as a con. car. For he makes  
no contract with the person putting letters



Com. Car. } Letter into his office & receives more  
mail from him, & the Gen<sup>l</sup> receives a  
compensation in the nature of a pour  
page, upon the letter, still it is considered  
paid by the Gov<sup>t</sup>. See 14. 2 Ray 646. Holt v. Kew  
but the rule well settled. Cow 754. 764.

And a Post  
Officer is not liable even for the actual de-  
faults of his clerk or under off<sup>r</sup>. - tho he  
is for his own defaults, as any other indi-  
vidual, he is not liable for defaults of his  
clerks for they are Officers of Gov<sup>t</sup>, tho crea-  
ted by his appointment, but in making  
this appointment he acts but as Test. of Gov<sup>t</sup>  
himself 3 Wils 448. Cow 763. See 15.

The com. car<sup>r</sup>  
has gen<sup>l</sup> been said to be liable upon the custom of  
the realm & the mode of dealing has been to  
count upon & unite the custom, as if it  
was a usual local custom, but this extends  
by no more rule than for the heir to  
count upon & unite the custom of dis-  
cent. - for the custom is gen<sup>l</sup> & as such a  
part of the l<sup>d</sup>. 1 Sid 245. Ward<sup>r</sup> 485-6. Hob 18.  
1 Str 33. 3 Mod 229. Jones 130.

When prop<sup>r</sup> is stolen  
from a com. car. or otherwise lost or inju-  
red as to subject him, he being guilty of no  
actual misfeasance, the remedy ag<sup>t</sup> him  
is by a special ac<sup>n</sup> on the case - however will

will not lie, but if he was guilty of breaking  
the box, or opening the safe of mine he was  
carrying & taking some of their contents, no  
matter how small the quantity, it will  
amount to a conversion of the whole, which  
however will lie 28 R 146.5 Bush 247.5 Bu 257. Sal  
255. Hob 257.

It follows then that he is not liable  
in trover even for actual negligence - because  
to subject him in that form there must be  
an actual misfeasance. Sal 255.

Innkeepers,  
are another sort of people exercising a pub.  
employment. And a delivery of baggage  
goods &c by a guest to an innkeeper is a  
baile of the fifth class. - It has indeed  
been very strangely classified by many auc.  
Exposers for public consideration, the least of com-  
modation, but to it, this bears not a shadow  
affinity, for Pub. M. P. it is treated as a mandate  
but this equally incorrect. Jones 130. 132. Chap  
D 629. 6. B. M. P. 13.

But the only class within which this can be  
brought is manifestly the 5<sup>th</sup> - for, it  
is a delivery of goods - to a person exercising  
a pub. employment - & for a reward.  
Nowward it is true is not paid as such  
but it is paid under room rent, services  
&c. Jones 133.

Speak of Bank " here only as bailor, & of their



~~Landlord~~ } their liability for the goods of  
their guests. - see the rest of the subject ~~at the~~  
~~discrepancy~~

The liability in this case being advantageous  
for both parties, ~~land~~ or ~~in~~ is by the gen<sup>l</sup>  
rule bound only to an ~~ord~~ case, & liable for not  
more than an ~~ord~~ night, but the policy  
of the law has extended this liability somewhat  
farther, but I find no rule which extends to  
that of the com. car. Jones 133. 135.

The Innkeeper  
is clearly liable for losses occasioned by his  
servants in any way whatever, for he is  
bound to provide honest & careful servants  
& 32.3 B. N. P. 1 Bl 420. Esp. D. 326.

now you  
must know that masters in gen<sup>l</sup> are not  
all liable for the misdeeds of their  
servants much less for their offences, but  
an innkeeper is not only liable for their  
deeds, but he is also civiliter liable for  
their robberies & thefts &c. So also if the  
goods of the guest are stolen by a stran-  
ger, he is liable even if he has taken an ~~ord~~  
care, for the law requires of him more  
than an ~~ord~~ care; This doubtless is a rule of  
policy in consequence of the ~~ord~~ great  
inconvenience to put the villain & 32.3a Esp. D.  
139. 224. 5 B. N. 276.

So this gen<sup>l</sup> rule there is an

an exception when the goods of the guest  
are stolen at the inn by the guest's own  
servant or companion; or any who at  
his request lodges in the same room  
with him - for in this case the law imbu-  
tes it to his own folly, if stolen by his  
servant it is clear the "Innkeeper" ought not to  
suffer. & if by a companion, he gives him  
aid by travelling with him. 8 Co 33. 3 Ba  
133. Esp 2625.

And an "Innkeeper" is held for  
loss occasioned by a mob & upon the same  
principle of policy, tho' there is nothing  
definite upon the subject. Plowden says  
that if the loss be occasioned by pub<sup>l</sup>ic enemies  
he need not be liable; for the reason that  
the force is irresistible, hence we infer  
that if the force was that of a mob he  
need be liable. Sir W. Jones says down the  
rule that he is released if the force was  
truly irresistible & this I take to be the  
true rule - but it is not carrying his lia-  
bility as far as that of the com. car. -  
8 Co 33a. Jones 135. a & b. Plow 9. 3 Ba 132.

It is the common impression that an  
Innkeeper is held to the same extent as  
a com. car. & I see no reason why he should  
not be so held - for travellers are obliged to  
rely upon their faith, are obliged to state of  
their houses, - their opportunities of pilfering &c



Embekeeper. } It containing with millions  
is great as those of 4 can. cor, while their  
means of defence are infinitely superior

But it is said down  
by La Coke that unless there be a default  
in him or his servants he is not liable, -  
this not to diminish & his liability to that  
of an <sup>ord.</sup> cor. - The case is denied by Justice  
Muller. 8 D 330 Est D 526; denied in 5 D 8  
276-7.

can Embekeeper however is liable as surety  
for all the goods of his guest when in the  
legal sphere or intra Hospitium when in  
cludes all his out houses, as for the horse  
which may be in one house, his car-  
riage in another & his horse in a third.  
8 D 808

If then the effects of the guest  
be removed from the inn by his own  
order. The innkeeper is not liable as  
surety. He is not liable at all unless  
for some default of his, eg. If the guest  
order his horse to be sent to pasture &  
he is a stranger, the Innkeeper is not liable. But  
if the fence of the pasture was bad  
or not sufficient in consequence of which  
the horse is lost, he is liable.

can if the Embekeeper sends the horse  
to pasture without the order or assent  
of the guest, he is liable, - for he has

has no right to remove the goods except  
hospitia without such a writ. 8 Co. 322. 1  
Sho. 4. B. 1. 2. 3. 4. 5. 6. 7.

The remaining rules will be reserved for  
the most able of Jurors. & Esq. Messrs.

6<sup>th</sup> Bailt of y<sup>e</sup> last kind is called  
Mandatum or Mandate. It is a delivery of goods  
to be carried or to have some act done on or  
about, for wh<sup>ch</sup> reward is to be paid the bail  
by bailor &c. the service is to be done gra-  
tuitously. This class of bailt. has sometimes  
been called "acting by commission" but it  
bears no affinity to that species of trust.  
- the bailor is called a Mandatory. Jones 30.  
43. L Ray 914.

The only diff<sup>er</sup> between a mandate  
& a deposit, is that the latter lies in custody  
& the former in possession, & it seems to be  
of the nature of a deposit, as it is for the  
benefit of bailor alone, - so that bailor is  
bound only to good faith, & is liable for  
nothing but its violation, or its equivocal,  
& gross neglect. L Ray 909. 919. 10 Co. 255. 1 R. 1  
158. 161. 2.

This was the species of bailt. wh. was tried in a  
famous case of Caggs v Bernard, wh. was  
decided on the ground of a special agreement  
being made. L Ray. 914.

which when there is a special agree-  
ment.



1127. Bailment.

Mandate, a promise by Bailor to use all  
neccessary care & skill, & a loss happen by his  
omitting it the Mandate is liable like any  
other bailor it acc. Jones 75.

The engagement  
to use all neccessary care & skill may be im-  
plied in some cases, but not unless the  
act to be done is in the line of Bailor's  
profession or occupation. Thus, if a taylor  
engages to make a garment, gratis he  
is impliedly engaged to use all neccessary care  
& skill. But if the cloth be delivered to one  
who is not a taylor, the law raises no  
such engagement. 3 Bl 165-6. 1 M & L 155. 11 Co  
54. 1 Saund 324. Jones 139.

Sir Wm. Jones makes a  
distinction between the duty of a Bailor  
without reward, when it lies in fearance &  
when in mere custody - in the former  
he says greater diligence is required than  
in the latter. in wh latter he must use  
a degree of care adequate to the service  
taking. - Now I confess this is a distinc-  
tion, of wh. I ~~do~~ neither see the reason or  
feel the propriety Jones 74.

Sir Wm. also says that if one agrees to trans-  
port goods gratis, he is not obliged to use  
all proper care, but if to do some labour he  
engages to use all adequate care, this  
distinction is arbitrary, & certainly is not

not countenanced by any decision or dictum & is opposed to the doctrine laid down in 3 Bl 155. & 11 Bl 156. There is no such distinction as this known to the Law. Jones 158. - 9.

But there is a dictum of La Longborough in 11 Bl 162. wh argues in attention. - He says arguendo, "That when a bailor undertakes to do an act skillfully or from the understanding the law implies such an engagement, the omission of that skill is gross neglect." Now avoid<sup>d</sup> to this rule whenever a bailor omits that degree of care wh the law implies for him, he is guilty of gross neglect, or in a other words he is subjected only for gross neglect. - This is confounding all the distinctions between the diff<sup>t</sup> degrees of care & negligence & renders entirely nugatory all that is said in the books upon this subject & is destroying the symmetry of the law. - for by this rule whenever a bailor is liable it must be on the ground of gross neglect, wh reduces all bailors so far as care & negligence is regarded precisely to the same level. But we well know that when more gn or d<sup>o</sup> care is required, bailor may be subjected for <sup>even</sup> slight neglect as well as for gross.

When then is no express or implied to use skill, or more gn or d<sup>o</sup> care, if he treats the



Mandate } The goods failed as he does his  
own he is liable only for gross neglect. Thus  
A & B. having two consignments, A agrees  
to enter them both at the custom house  
he entered them both under a false descrip-  
tion, in consequence of wh. they were both  
seized. - A was held not to be liable for  
the loss of his own goods without the pres-  
umption of gross neglect, or of fraud. 1 W Bl 158  
1 Dow 255.

The true distinction I take to be, this, that  
when one engages to do an act for another in  
the line of his profession, the law does im-  
ply that the work shall be done with all  
man's care & skill, but if the act is not in  
the line of his profession, he is liable for nothing  
short of gross neglect.

But in case of the act be-  
ing professional it seems that the engage-  
ment implied by law does not extend only  
to the passing or doing of the act wh. is en-  
gaged to be done & does not provide agt  
accidents from foreign causes. - in such as  
are not attached to the stipulated act. -  
as in case of a Taylor, by implication he enga-  
ges to do his work with all man's skill  
but the engag't will not subject him for  
a loss by robbery or theft. &c. & indeed for the  
loss of goods he will not be liable unless he  
was guilty of gross neglect. - as is with an tailor

Sup<sup>m</sup> a Taylor engages to make a garment  
without reward then for want of the me-  
asure in making it, the cloth was in-  
jured he is liable for it on his implied eng-  
agement. But on the other hand, suppose  
that having made the garment, he leaves  
his doors open & it is stolen, now the question  
of his liability here does not depend upon  
the former, for if he had responded only to goods  
of tailor by leaving his doors open, he would be  
liable, but if his own were also responded, he  
is not liable, see 2 Ray 918. 1 Pow 255.

and when

there is an express agreement by a mandat<sup>y</sup> to  
keep safely it does not subject him for  
loss occasioned by the act of God or by rob-  
bers. indeed it does not subject him  
unless he has been guilty of some degree  
of neglect. for all that can be implied from  
such an engagement is that he will use all  
requisite care, & it is not to be taken that  
he insures against elements, note see 2 La  
Ray 910. 915. Jones 62.

But I take it that a mandat<sup>y</sup>  
cannot by a special engagement excuse him-  
self from liability for fraud, for this is  
contra bonos mores. & is illegal by the rules  
of contract. Jones 66. 75.

There has been some con-  
trariety of opinion & perhaps in the authorities  
as -



Mandate asks how far an express agreement  
amounts to do some act, as to carry goods  
will bind him as a contract. - and if to some  
it will not bind him, is being a contract with-  
out consid<sup>n</sup> & then place his liability alto-  
gether upon the ground of fraud, or the  
want of care. But it seems to me clear  
upon prin. that on delivery of the thing  
failed, it does bind him as a contract. - for the  
delivery is a suff<sup>t</sup> consid<sup>n</sup> as we put. &  
L Ray 909, 910, 919, 920.

The true distinction is, that if one offers to  
become liable for another, gratis. - it is not  
binding, but if the goods are actually deliv-  
ered into his hands either upon an  
express or implied engagement. He is liable  
on the contract. - for he may be sued in  
a p<sup>t</sup> wh. is an ac<sup>n</sup> founded on contract. La  
Court recognizes & will in the case of Bay-  
er v Bernard L Ray 920. 5 ER 143, 149, 150, 10 Ba  
241. Dalt & Lhu 129, 12 Mott 487. 5 ER 10 Bow 364. Cro.  
J. 607, see contract (p. 125) where it is held  
that such an agreement does not bind as a  
contract. - but the case in Cro J. is strong, the  
other side as can be, then it delivered goods  
to B. in consid<sup>n</sup> of his prom. to deliver goods  
to A. then was no other consid<sup>n</sup> B. engaged  
to deliver them & then it lost a p<sup>t</sup> of the  
on the express promise, & it was sustained.  
the consid<sup>n</sup> being held suff<sup>t</sup>, but it is -

is a very full hearted case moved on the  
promise was made as a contract. - It is true  
however that he might have moved on &  
implied apt for money had I said but there  
the action was lost in that precise, naked,  
form for the very purpose of raising this ques-  
tion see J. 567-8. L. Ray 926.

However Sir Wm Jones  
observes that when special damage has accrued  
in consequence of promisor's not becoming  
bailor accord<sup>d</sup>. to promisee engaged in ac<sup>n</sup> will  
lie ag<sup>t</sup> him for the damage Jones 46. & 50.  
and he also says that the ground of the ac<sup>n</sup> in  
these cases I have just been consid<sup>d</sup>, is the special  
damage. Now it is to be observed, that this special  
damage must arise out of a breach of contract.  
so if there is no contract it must be a little diffi-  
cult, for a special damage to arise. Thus if  
it is going a journey & agrees to take letters  
for B. & then fails to go, in consequence of not  
loosing the freight of his ship, - this is a special  
damage, now I agree that if there is no special  
damage, no ac<sup>n</sup> will lie ag<sup>t</sup> it. But I confess  
I cannot tell upon what basis of the fact the  
special damage is the ground of the ac<sup>n</sup>, the agree<sup>t</sup>  
is a mere nudum pactum, If it had been  
the prop<sup>r</sup> who had been paid for carrying it, he would  
be liable - but not when the engaged was merely  
gratuitous. Sir Wm. says that if actual damage  
has ensued the ac<sup>n</sup> may be maintained,  
why?



of a depositary? Why? Now every civil ac<sup>n</sup> must  
sound either in tort or contract. It does not  
here sound in tort, for there is no fraud in &  
guilt; that, I consider as admitted, & if there is  
the onus lies on the ~~plff.~~<sup>def<sup>t</sup></sup>. he therefore must lie  
satisfied on this ground. Then he must lie up  
on the contract. I so say. Sir Wm. if ~~there~~ special  
damage has arisen; But a contract must be  
either good or bad at initio, tho the damage  
may be increased by matter of post facto, &  
if the contract is good at initio the special dam-  
age will be implied from the breach; but  
the contract is allowed to be bad, without the  
special damage; this than being the case  
is entirely negatory, & the ac<sup>n</sup> cannot  
be maintained. L. Ray 9th. 910. 919. 920. Jones 76th 90.  
It is so say.

by Sir Wm. That when an ac<sup>n</sup> is lost ag<sup>t</sup> a Man-  
datary, neglect is the ground of the ac<sup>n</sup>. & not  
his express promise, or undertaking; Now I  
cannot comprehend how he can be satisfied  
upon his negligence, when that neglect con-  
sists in a mere breach of contract, unless that  
contract be itself void. - for if the contract is not  
void there can be no ground of recovery. & if  
y<sup>e</sup> ac<sup>n</sup> be upon the neglect at all it must be as  
a breach of contract. But there is a class of cases  
wh<sup>ch</sup> denies ~~some~~ viz. Whenever a depositary,  
& expressly engages for a given degree of care, greater  
than that wh<sup>ch</sup> the law requires of him, he

is liable to the extent of it his engagement  
as, even incautious men engaged to carry off  
the manans a' top by bottles. - If he is not  
he certainly is liable for the loss. Now Mr.  
Wm. says he is liable on the ground of neglect;  
but then we will suppose him to have been  
guilty of no neglect at all, - still he is  
liable. But ag<sup>n</sup> how can the engag<sup>t</sup> impose  
upon him a new liability? For Wm. is  
very confused upon this subject, & there are  
peculiarities in his otherwise correct essay,  
& there is not for respect to the author  
I did not have taken so much notice  
of it, - that bailer is liable to the extent of  
his engagement, see 2 Rag 910, 919, 3 East 62,  
5 East 148, 149, 150.

Miscellaneous. Liens.

Liens. Under a  
gent division the first enquiry is, In what case  
the bailer is entitled to a lien on the thing  
bailed as against the bailors

Now a lien, is a direct claim or incum-  
brance, on some specific prop<sup>y</sup> of another  
as a security of a debt or duty, & it is always  
accompanied with actual possession. & ag<sup>n</sup>  
prop<sup>y</sup> & a lien are two distinct things - ag<sup>n</sup>  
prop<sup>y</sup> cannot exist without a lien, but  
a lien does not always depend upon a  
specific prop<sup>y</sup>. Now I conceive, that a



Lien a lien, properly so called, exists only in favour of bailor of the fourth & fifth classes i.e. in favour of pawnors & of those who do some act for a reward; tho it does not extend to all of this class.

as to pawn<sup>ers</sup> The Lien is created by the delivery itself & the terms of the bailment, without any thing & apart from being done by the bailor; indeed the precise object of the bail<sup>ment</sup> is to secure a debt & this security rests essentially in the existence of the lien, so that the paw<sup>er</sup> has in all cases of lawful bail<sup>ment</sup> a right to retain ag<sup>t</sup> bailor until the debt is paid Cro. Jac. 445. Yelv 198. Sal 522. Cr. Ch. 519. Esp. D583.

Most bailors of the fifth class have also a lien, or a right to retain the goods bailed by way of a security for their wages, or debt due them for work &c done, The Lien here is not created by the terms of the contract as in case of pawnors, but it is a custom in law annexed to the bail<sup>ment</sup> - for the law does not require the bailor in this case to express any distrust of bailor, & so demand a security, but it allows him to retain the goods until his hire is paid. 3 Bb 145. Hob 142.

It is not universally true that bailors of this class have a lien, tho they generally have; I shall distinguish between

between them as agreed.

A bailor who has a lien upon goods is deprived of their possession by a wrong doer, - the wrong doer cannot avail himself of the right of the bailor, - he cannot hold against either bailor or bailee, & bailor may recover of goods of him without even paying his debt, - for the wrong doer has no right. 2 Bl. 485. 3 East 585.

In the first place then the conv. car. has a lien, or a right to retain possession of the owner of the goods until he is paid his price of transportation. 2 Ray 752. 869. 5 Burr 286. 6. 5 Burr 269. 2 Cal 654. 2 N. R. 64. in one solitary opinion conv. car. 2 Ray 869. by Powell J.

And indeed if goods are stolen and delivered by the thief to the conv. car., he may retain possession against the owner until he is paid the price of transportation - for by law, if conv. car. is alleged to receive goods when offered him, & he is not alleged to be so un civil as to demand that he be paid. 2 Ray 869.

An Innkeeper also & upon the same principle has a right, in the first place to retain the horse of his guest until the expense occasioned by him is paid. - for he is alleged to receive the guest & his horse or other animal as & care may be



(Miscel. Rules, Linn. Co., & also to provide for them. The  
common law. 3 B. & P. 43. 3 B. & P. 208. Lat. 388. 8 Co. 149. -  
3 B. & P. 185.

could not the horse of a man taken to an  
inn by a stranger & there provided for. The  
Innkeeper may detain him agt. the true owner  
(A.) - This is precisely analogous to the case  
of the goods being stolen & delivered to a  
conv. car. - it. natid. Yelv. 67. Poph. 128. 179.  
Exp. D. 54.

An Innkeeper may also detain the person  
of his guest, until the whole bill is paid, for  
he is a pledge for all the expense wh. accrues  
at the inn, but he can detain the horse on-  
ly for the horse's expense - as with regard to him  
the Innkeeper is bailor, & as with other  
bailors of him extends only over the subject  
of the bailment. The guest being in the nature  
of a pledge may be retained by the innkeeper  
by his own right hand without any aid  
from the law. & he may enclose him in  
any room of his own house - for this  
is one of those cases in wh. the law allow-  
ows of individual to enforce his own rem-  
edy. 1 Show. 269. 2 Rol. 35. 3 B. & P. 185.

But in this  
as in all other cases of him, the right is  
lost, by a voluntary relinquishment of it  
actual possession to the bailor, Thus if an Innkeeper  
vol. & refers the horse of his guest to be taken

taken away, or the com. car. delivers the goods, must  
can again reclaim the goods, recommended, for  
actual possession is what <sup>may be</sup> called an essen-  
tial incident of a lien, without it it can-  
not exist, it is a legal solatium, & hence it  
is said that he who abandons voluntarily, a  
lien, abandons it forever. *Sto 559. Burr 193.*  
*494. 1 East 4. Esp D 584.*

A Taylor also, & any other mech-  
anic has in gen. a lien upon the materials  
upon which he has bestowed labour for the tailor  
case, & delivers cloth to a Taylor to make a coat -  
If he delivers a coat made, he loses his lien.  
*8 Co 147a. Hob 2. Cyler 57. 1 Ba 240.*

In this last case however the same reason  
does not support him in retaining, that does  
the com. car. & imph<sup>o</sup> - for no mechanic is  
obliged to work for another, but the lien  
is given in these cases, as it is said in behalf  
of trade & commerce.

When however a mechanic  
is in the habit of trusting to the personal credit  
of tailor, he ought not it seems in any fair  
historical instance to assert his right  
to retain without giving notice thereof at the  
time of receiving the goods - for no notice being  
given it is presumed he goes upon the personal  
credit of his employer as before, but with  
strangers he may retain without notice.

*Ba 240m.* - there is no express decision upon a painter.



Miscel. Rules Lien?

But an agitating farmer  
(who is a tailor of the 5<sup>th</sup> class) has no lien  
upon the cattle delivered to him. - for neither  
of the reasons operate in his favour, which  
given in the preceding rules viz he receives  
no pub. employment, & the interest of trade  
& commerce does not require he should have a  
lien B.M.D. 45. Bro.C. 197, 1 Da 240

And the Capt. of

ship has no lien upon the ship itself for his  
wages & stores, tho' the mariners have, - for  
the Capt. is an agent to the owner's concern of business  
supposed to the per. audit of the owners, - whereas  
the owners are unknown to the mariners, &  
they are supposed to trust to the audit of the  
ship - & they are employed by the Capt. who in  
this acts as agent of the owners. Daug 97. Abbott  
on Ship's. 460. L.Ray 632. 576. 12 Mod 140. 141.  
to the Capt. as to the mariners see L.Ray 937. Daug  
101. Abbott. 459.

But when there is a special agent  
on wh. tailor relies for his compensation &  
law creates no lien in his favour. This is  
case of a farmer to whom a horse was deliv<sup>d</sup>  
to be kept & cured, the owner having agreed  
to pay a sum certain, - it was held, & for<sup>d</sup>  
ed not recover retain the horse as a lien, as  
the agent<sup>d</sup> ousted the lien, or right of retain<sup>r</sup>.  
The reason assigned is that when there is such  
an agent. the tailor does not rely at all upon

upon the fact of an agent being made is proof of this. - but this reason is too artificial - The true reason to take hold is, that when there is an express promise of two cannot imply one, upon the maxim *expressum facit tacitum*; 2 Vol 92. - *Yelv 66. 5 Co 271. Esp 258.*

Factors & Commercial agents in genl have a lien upon the goods of their principals, wh they have in actual possession, for the payt of the balance of an<sup>t</sup> to be taken themselves & *prin<sup>ts</sup>*; These agents usually are paid a commission 1 ER 119. Com. D. *Mercat. D. 254. 1 Burr 494. 2 Vol 1154.*, for the remain<sup>g</sup>. distinctions as to lien wh com<sup>ts</sup> are to have so sa *Mercat. & Lent. Bt. 27.*

There are 8 principal cases who have a right to a lien upon the goods of their principals - for the payt of their debts & duties. But it is not to be understood that these are the only cases who have a right to hold y<sup>e</sup> prop<sup>ty</sup> at all ag<sup>t</sup> of law. For instance the *Ship*, has a right to retain ag<sup>t</sup> the <sup>to</sup> latter until the time, for wh y<sup>e</sup> prop<sup>ty</sup> hired, is paid, or until y<sup>e</sup> act to be performed is done. So also in case of a loan, wh y<sup>e</sup> prop<sup>ty</sup> is delivered - altho the title is gratuitous, lender has no right to retain at pleasure; lender can hold until y<sup>e</sup> object of the loan is accomplished.



4  
Discharge? Bail, & completed. And if I make a  
gift & at the same time transfer the  
property, I cannot countermand the delivery -  
but in all these cases the right of bailor  
is not a lien; but he has a special prop<sup>y</sup>  
in the thing bailed which enables him to retain  
it. 12. Mol R 128. 1 Da 245.

Q. Now far are the  
rights of strangers affected by bail?

Disputes between  
bailor & bailee as to their respective rights do  
not often arise; the disputes are usually be-  
tween the bailor & the purchasers or creditors  
of bailee. But previous to discussing this busi-  
ness, I lay down some introductory rules.

It is  
laid down as a genl. rule that if one bails goods  
as his own, the goods of another, bailee must  
redeliver them to bailor without regard to if  
true owner - because it is said, the bailee can  
judge between bailor & the true owner. This  
is living in prop<sup>y</sup> of prop<sup>y</sup> Celory<sup>2</sup>, to B. bails it to  
J. J. must redeliver it to A & not to B. 10a  
506. 7. 10a. 287. 242.

Now I apprehend that this rule means nothing  
more, & if it does, it means more than is law,  
that. That the bailee will be justified in redeliv<sup>g</sup>,  
prop<sup>y</sup> to bailor i.e. if he redeliver the prop<sup>y</sup> to  
the person from whom he received it, he will  
discharge himself ag<sup>t</sup> the claims of the

the true owner. & the reason of the rule goes only to this - it is not so hard to compel the bailor to judge as his bail; for if the judge be misled after the subject, & the rule was not made to confer a right on the wrongful bailor, but to protect honest bailor. & this end is attained by this qualification of Holt's rule, & it is not also right upon principle - for as if the bailor had no right to retain agt. B. of true owner, he can derive no right from him, whereby he can hold. And again this is supported by a subsequent passage of Holt where he appears to be long acc. - where it is said down, that if the bailor deliver the prop<sup>y</sup> to bailor, before or pending the ac<sup>t</sup> agt himself but by the true owner, it will bar the ac<sup>t</sup>, and this I take to be the true rule, for it protects honest bailor, & does not deprive the true owner of his right. 1 Bra 442. 1 Hol 507. 2 Ryd 137. And this further shows that the true owner can recover of the bailor.

In cases of this sort when there is a dispute as to title of prop<sup>y</sup> bailed, if the true owner does not exhibit to bailor suff<sup>t</sup> evidence of ownership, yet brought not upon him to be subjected, - he here stands in the place of a finder, but if suff<sup>t</sup> evidence appears that he is the true owner, he discharges himself as.



Procell's Rules & as alone & Lord Ray 807.

If the rule cited by Rolle is correct  
it renders entirely nugatory, that of L Holt, -  
that if goods owned by A are stolen by B &  
delivered to a com<sup>o</sup> carrier, the com<sup>o</sup> can hold  
until his claim is paid. but no longer.  
- for in such <sup>ie: accdg. to Rolle's rule</sup> case, the carrier wd be always ob-  
liged to pay deliver to the thief - so that the  
true owner wd never get his property. L Ray  
807. Ex 2599.

Arg<sup>o</sup> awarded to the benefit of Rolle  
if the bailor in cases of this kind dies, &  
his Ex<sup>o</sup> comes into possession, he must deliver  
to the true owner at his peril - for he  
obtained his poss<sup>o</sup> by operation of law, he must  
deliver to him whom in law is owner.  
Now if presents a hard case for the Ex<sup>o</sup> as  
his test<sup>o</sup> might have discharged himself  
by delivering to carriers & the law is signed for  
this is that he wd not judge between the Ex<sup>o</sup>  
& true owner, how how has the Ex<sup>o</sup> any  
greater power to judge? Argu<sup>o</sup> it is to be  
presumed he has not as great power, or rather  
has not as good means of determin<sup>g</sup> who is  
owner as his test<sup>o</sup> - The rule is arbitrary  
& artificial - I can see no reason why the  
Ex<sup>o</sup> & Testator shd not be upon the same  
ground - But there is nothing in the book  
contradicting the rule in Rolle, Rolle 607  
1 Bra 204.

of the rights of the Bond & Marsh<sup>rs</sup>.  
of Bailies. Now come to consider the rights  
of the Bond<sup>rs</sup> of Bailies who lay upon the goods  
bailed supposing them to be his. It also the  
rights of purchasers, who purchase the goods  
bailed under the same supposition: - Cases  
of these kinds are more frequent than any  
others under the law of Bailments.

By the St.

2. Jac. 1<sup>st</sup> wh is a St in affirmance of the St.  
If a Person becomes a Bankrupt having in  
his "possession, order & disposition" the goods  
of another, with the consent of the owner  
they are liable for the debt of the Bankrupt  
Bailor & the Bond<sup>rs</sup> may take them as the  
Bailor's prop<sup>y</sup>. 1 Co. 166. 1 B. & P. 82. Doug 303. 85.  
Rep 82. 7th 228.

This St you observe relates to the prop<sup>y</sup> of  
goods as bailed of another & becoming bankrupt.  
While in prop<sup>y</sup>. i.e. it does not extend to  
cases in wh the Bailor does not become  
bankrupt. 2 B. R 67.

It extends as well to cases of the possession  
of goods not originally belong<sup>g</sup> to the insol-  
vent, but bailed to him, as to those in wh  
the goods were orig<sup>lly</sup> his own, & have been sold  
without a transfer of possession; Cowp  
230. 1064 P 82. Esp D 569.

And there remains  
as to goods originally belong<sup>g</sup> to insolvent & by him



*Misc. Rules.* And <sup>end 3</sup> him sold, but, by the rule  
sufficed to remain in *prop.* of vendor, - the rule  
was as strong in favour of end<sup>3</sup> before the  
St. of Jac. as it now is under the St. for  
by 9 Ld 13 Edg & indeed by the Act, such a sale  
of chattels personal, is said to be paid-  
intent, as ag<sup>t</sup> end<sup>3</sup> - or, more correctly speak<sup>g</sup>  
it is a badge or evidence of fraud, not mag<sup>3</sup>  
Lencut 2d. How 233. 3 Edg. 2 M 587. 595. 7th 71.

The end<sup>3</sup> of  
the bankrupts are allowed by the St. of Jac. to  
come upon the goods in his *prop.* as his  
not strictly on the ground of fraud  
between the bailor & bailee, but merely  
on that, of false audit derived from his  
ostensible ownership, for, this apparent  
or ostensible ownership, gives the man  
a credit, & indeed may have given him a  
credit on which many debts were con-  
tracted, at any rate, it caused the end<sup>3</sup> not  
to take security, & to sell them for less. So  
that if he sells goods to B. & B. having the *prop.*  
since a disposition of them becomes a bank-  
rupt, his end<sup>3</sup> will hold ag<sup>t</sup> the bailor  
How 364. 258. 270. 372. Exp 2556.

The bailor's rebutt<sup>g</sup>  
any presumption of actual fraud be-  
tween himself & bailee, will not at  
all avail him, in these cases, as ag<sup>t</sup> the  
end<sup>3</sup> of bailee; for their claim is not.

not founded upon such a presumption  
but upon the fact and given. 10th 180  
188. 1 Vez 305.

This 2d of Dec. seems to be founded  
upon & in affirmance of that great  
principle of the C.L., That when one of  
two innocent persons is to suffer by  
means of the third, he who occasioned  
the 3d person to cause the loss, shall suffer  
rather than the other. Here the bailor  
gives the bailor the audit therefore &c. -  
- This is a C.L. & clearly an equitable rule.  
20 R. 70.

If the 2d is in affirmance of the C.L. it  
is of as much importance here as in  
Eng. In Eng. it has been adopted as C.L.  
& I think very properly.

But the 2d does not  
stand to prop<sup>r</sup> in the hands of the bank  
rupt, who holds in the right of another  
as Guardian, Executor, Husband &c. for in  
all these cases the Bankrupt holds or posses-  
sion not thro' the folly of bailor but  
by the operation of Law. There is no con-  
sensus on the part of the bailor, - the 3d and  
Wife &c cannot prevent the prop<sup>r</sup> 12th 139.  
3 B. & W. 189m. 3 B. & W. 618.

It does stand however in  
mortgage of goods, when the mortg<sup>ee</sup> is left  
in prop<sup>r</sup> & he becomes bankrupt - and will  
hold



*Mitchell v. Miley*, (und<sup>d</sup> & <sup>h</sup>o<sup>l</sup>d<sup>r</sup>), the exclusion of the ~~ship~~  
gauge. *Robt. & C.* 549, 10 557, 10th 185, 11th 349, 11th 260.  
Exp<sup>d</sup> 2566. That this will save, notwithstanding its  
mortg<sup>e</sup> of land. For there prop<sup>y</sup> is no ind<sup>e</sup>  
of the legal title, the knowledge of the title  
is to be had by the deeds. He who neglects  
the examination runs his own risk - The  
Stat<sup>e</sup> law applies only to chattels.

This stat<sup>e</sup> ag<sup>t</sup> does  
not stand to a sale or mortgage of a ship  
at sea, for in such case the immediate  
prop<sup>y</sup> of a prop<sup>y</sup> cannot be given, Thus a  
sale or mortg<sup>e</sup> by a bill of sale a ship at sea  
& then becomes a bankrupt. Now a. Leg,  
means of his agent or the Capt<sup>n</sup> & mariners  
has the constructive possession of the ship,  
but this end<sup>r</sup> cannot take the ship on her  
return to the exclusion of the Vendor (B), but  
B should take prop<sup>y</sup> immediately on her return  
or she will go to the end<sup>r</sup> on the ground of giv<sup>e</sup>  
a false exhibit. A by the sale transferred all  
he got - or he did all he could do for transfer<sup>e</sup> & back<sup>d</sup>.  
10th 160, 11th 354, 361, 366, 2 ER, 462, 485, 491. Exp<sup>d</sup> 2  
587.

Actual manual delivery is also dispen-  
sed with, in case of a symbolical delivery.  
Thus a having goods in a store, sells them to  
B. by a bill of sale, & delivers him the key.  
The delivery of the key is symbolical; & transfers  
the goods to B. ag<sup>t</sup> & end<sup>r</sup> of A, if he transfers after  
und<sup>d</sup>

affirmative a bankrupt - For it gives him  
the command of the door, And also of  
the goods. 7 BR 11. 2 Lth 955. Exh. D. 577.

So also to  
bring the case within the Act the goods  
must be possessed by the bankrupt  
as his own goods are, not as a bailee  
if the Act is meant to reach only in the  
possession but also in the order & disposi-  
tion of them - so as that he is the actual  
owner of them, - tho if it be a box  
of goods to be kept in secret as in  
his cellar, bailie's entry cannot hold the  
exclusion of bailor - for nothing  
is said to nullify view, no false entry  
was given him by the bailor - he was not  
in the "order & disposition of them"  
and so if one <sup>hires</sup> hire a horse of  
another to go a journey, the entry of borrower  
or hirer do not take the horse, for his  
possession is not sufficient of ownership, there  
is no false entry given, if he do let them  
no bankrupt and he able to go to mill or  
home back.

But in the contrary if it be purchase  
an apartment of goods, & wishing to be  
down and owner, and deliver them to be  
possessed of, sell, manage contract about  
them as his own & in his own name, &  
said to be bankrupt, this entry will hold.



Michael & Philip ~~Bar~~<sup>Bart</sup> hold for he is the ascertainable  
owner, as he does not call himself clerk or ag-  
ent. Edw & J. B. North 185. 3 R 116. Exp & 567, 576.

There also a  
 temporary prop<sup>y</sup> for a party & much  
 by assessor who becomes a bankrupt. does  
 not bring the case within the Act. I know  
 of 10. at a distance from home who lodge  
 goods with B. to remain until the roads  
 were better or a relief arrived, or a wagon  
 arrived to transport them home. If the  
 depositor who become a bankrupt in the  
 mean time, his creditors could not take from  
 the prop<sup>y</sup> contemplated by the Act is, to give  
 audit cash 145. 12<sup>th</sup> 197. 200. Feb 25, 67.

being the case within the Lt. the Law must  
fail to appear in all respects to be  
the owner, for if from the nature of  
his business the presumption of owner-  
ship is excluded the sailor will hold  
to the exclusion of the creditors as, if a  
factor has the goods of B in shop. A holds  
them as his own, - for the nature of his bus-  
iness excludes & precludes "presumption". If his  
shop gains him no credit & B P & R. But  
318. 3d 185. Est. 2571.

The Purchasers of Bales  
who purchase the goods baled & appor-  
ting to be his, will hold ag<sup>t</sup> & bailor

bailor, precisely as well the creditors, i.e. ac-  
cord<sup>d</sup> to the distinctions taken above  
see 2 Ba 502-3.

Indeed where goods have been  
sold, & permitted by the vendee to remain in  
the hands of the vendor, & he becomes insolvent  
the Stat<sup>y</sup> Eliz gives a subsequent purchaser the  
preference, i.e. it excludes the bailor, see Abbt.  
2 Ba 502-3.

The C.L. however wd have attained all  
the ends, wh are now attained by both of  
St of Jac. & Eliz. The St of Jac. as said before  
is adopted as C.L. in this state. Cow 434.

In com<sup>m</sup>  
cases however of bailment, when the bailee  
is not in the order & disposition of the goods,  
tho in possession, & of course not the ac-  
tual owner, or does not become bank-  
rupt, the gen<sup>l</sup> rule of the C.L. is, that the  
true owner, or bailor, may recover the goods  
of the purchaser under bailor, or any sub-  
sequent purchaser, or of creditors who may  
have lived upon them, with the simple  
exception of a sale having been made  
in market overt, & this upon the max-  
im causat emptor. Therefore receiving  
is no false credit given - for bailee had  
not the order & disposition of the goods  
tho he had the poss<sup>n</sup> - so that this sale was  
a trust of trust - wh can convey no title  
ex. 2<sup>o</sup>



Miscell. & Illus. - Purch. <sup>19</sup> } ex. gr. et. lets a horse to B.  
 to go 100. miles. A. in track of that sells him  
 to B. while on his journey, now B. comes not  
 against the Lender (A.) - for the circumstance  
 of B's riding the horse is no evidence of ownership  
 ship, for the letting of horses & carriage is a fact  
 of daily occurrence, & it is the rule to L. & E. & E.  
 So, no matter how numerous may have been  
 the sales, or how honest may have been the  
 indiscrete purchasers, the rule is the same  
 the purchaser must lose his money, unless  
 the horse has been sold in a market overt.  
 1 Wils. & 2 Ltho 1187. 3 Cstth 44. Cal 289. Esp D 579.

And in another  
 case which is a very leading case in the Eng.  
 Reports, is, When ex. deposited a sealed bag of  
 jewels with a jeweller & he in track of that  
 broke the seal & pawned the jewels, on the ques-  
 tion whether the pawnbroker held agt. the  
 true owner, the Ct. held he did not, & it was  
 solemnly adjudged, that the jeweller was not in  
 the order & disposition of the goods by the  
consent of the tailor, tho in shop. Reports  
 is House 3 Cstth 44. 1 Wils. &.

When bailor has been  
 in possession for some considerable time  
 but not in the order & disposition of the  
 goods with the owners consent, the rule is  
 the same but it has been a good deal com-  
 plained of. 3 SA 376. 1 Wils. 840. -

But there is an exception to this rule when the prop<sup>y</sup> & lailie is money or bank-bills, or whatever constitutes the currency of the country, for here a regular transfer by the bailie to a bona fide receiver, i.e. to a person ignorant of the right of lailie, will bind the prop<sup>y</sup> & tho it is not a transfer in market overt. Lac 186. 3 Burr 1516. Pet. Rep. 416. Ex. 239. 579. Thus if a deposit of money with B. for ever so short a time, & B. in breach of trust, dispose of it as above, the receiver will hold to the exclusion of A. Indeed the rule wd be the same if B. has stolen the money. L Hardwicke says this is because the money has no mark. But this rule reason wd not hold in case of bank-bills, any more than of a specialty. The reason is not true tho genuine the true reason is, one of commercial policy - that it is money, & this is all, for if every man was obliged to enquire into the title of the holder of the money, before he received it himself commerce wd shortly be at a stand.

Both in Eng & Conn. for I take the rule to be the same, tho it of Jac. Prising Ben has adopted - A auditor of lailie who raises of prop<sup>y</sup> & as his, or a purchaser under lailie will not hold the prop<sup>y</sup> & in any case unless the lailie is insolvent. The reason of this is, that if lailie is solvent, the purchaser



Shiell & Mads Bank? Purchaser has his remedy on the implied warranty, & the auditor may say on other prop<sup>s</sup>. - & the only reason why the Purch<sup>r</sup> can hold in any case is that the Bail<sup>t</sup> has given a false credit. It therefore is indispensable under the Act it is the same as C.L. to entitle the Purchaser to hold ag<sup>t</sup> the Bailor, that the Bailor be insolvent. 3<sup>rd</sup> Act 44.

and even when the Bailor is insolvent the Purchaser cannot hold unless the prop<sup>s</sup> of the Prop<sup>r</sup> tended to give him a false credit. - This rule is founded on the words of the Act, that he must have the order & disposition of the Prop<sup>r</sup>. 1 B & P 35. 88. 648. Doug 306. 7 P.R. 67. 287. 1 Vez 243. 10th 185.

and further the auditor of an insolvent Bailor will not hold ag<sup>t</sup> the Bailor, unless the terms of the Bail<sup>t</sup> be such as, to give the Bailor a prop<sup>r</sup> as of his own i.e. to make him the ostensible owner, for otherwise he is not in the order & prop<sup>r</sup> disposition of the goods with the consent of the Bailor; - which latter incidences also must be. - For I have observed, that if a Purchaser or a part<sup>r</sup> of goods agree to the complete contrail over them to bargain about all as if B. becomes insolvent, this end<sup>r</sup> will hold ag<sup>t</sup> C. - I have not observed, by a deed. Late when the purchaser broke & was laid by a trader.

breast of Hunt & thus became the ostensible owner; he doing this without the consent of the owner, the owner or tailor held against the purchaser, &c., - from which two cases the proposition is apparent. 18th 185. 3. \$144. —

The great  
Principle governing the relative rights of a sailor on the  
one hand & of the auditor of the vessel or purchaser  
under him, on the other, have been already ex-  
plained yet as they are of frequent application  
I will state a few more examples

To bring a case  
 within the Act the claimant must not only be in  
 possession, but he must have the order and  
 disposition of the goods i.e. he must appear  
 to the world the true owner of the goods.  
 — this is also the old rule

To get purchase goods f<sup>r</sup> B. & have you  
with him untill he can remove them, if  
B. learned has brought the goods will not  
go to his creditors

So a traveller came his home &  
brought him with a friend to be cured, and  
he breaks his carriage & leaves it to be mended,  
and in the mean time the ball becomes  
so much so, there is no possibility of cure,  
can hold a ft. sailor

and it is a good thing to have  
 there is given to the fairer a new way of  
 for a short time <sup>except</sup> the reasonable time of 4.



Miscel. Chas. } of ind. of Laine on his becoming  
- Capt cannot hold agt of Laine Aug 50.  
1845/35. & 1847. Cap 2567.

Now the circumstances un-  
der which one man may be in the poss<sup>n</sup> of  
good of another in the character are indef-  
initely mixed & numerous. There are  
many cases in wch a credulous man wd  
trust to the evidences of ownership when  
a cautious man wd not. This is entirely  
explained above.

One morn, a case arose in this state  
A dealer in cattle hired a drover to take  
them to N. York. The drover left the main road  
& sold the cattle to some in country persons  
whereupon the owner claimed & recovered them  
in an act of trover. The mere fact of driving  
was not evidence of ownership - for owners  
seldom drive their cattle to market - many  
more cases might be stated but they wd be  
superfluous.

When goods are bailed for hire  
to be used for a certain time by Laine, - it has  
been a moot question whether the Laine  
and J. had sole interest in the thing bailed  
by an ex<sup>o</sup>. - This suppose it has a right of sale  
of B. for 6 months - then it has a pecuniary  
interest for that time - Can his creditors take  
by ex<sup>o</sup>. his special interest? La Parson seems  
to assume this in his argument, when he says.

says, that the endorser would be entitled to the bene-  
ficial use of the goods, during the term

But I am sure that the endorser cannot take the goods,  
and I go upon the ground that the bailor of a personal  
chattel is always a fiduciary contract. I think that when  
upon the subject of pawns I observed that the  
pawnee cannot assign the pawn until the pawn  
becomes absolutely in him: Can then the endorser of the  
hired horse take the thing hired? If he can, If one should  
hire a horse to go to Hartford, his endorser might  
take him, but the hirer himself could not assign  
him.

I repeat the contract is fiduciary & confers  
no right to the bailor to transfer that was not  
the intention. If the bailor can lawfully assign  
he will not be answerable for the conduct  
of subsequent bailees, so that a stranger would  
become the arbitrary disposer of the interest  
of another. It appears then to be going too  
far to say that a bailor can assign personal  
chattels, a fortiori then his endorser cannot take  
them - for L<sup>d</sup> Kenyon's dictum see 7 ER 11. But  
a bailor cannot assign see 5 RR 44, 4 East 6.

The truth is however that the opin-  
ion of L<sup>d</sup> Kenyon taken secundum subjectionem  
matrimonii is not at all repugnant to the  
law. I have laid down, the case was a quasi  
as to furniture hired with a house, & as the  
term might be taken, the furniture might be  
taken with it. see 2 Ba 352. Com D.



Principles of Law } D. Ex. C. 4. Cal 404. 2 May 995. 915. 916.

Thus far  
of the relative rights of the bailor on the one  
hand & of the bailee on the other. A purchase under the bailor  
on the other. We are now to enquire.

Whether or not the Bailor & Bailee may be respectively entitled.

It is  
a general rule in the law laid down as universal  
that the bailor as he has a general property in the  
goods may recover in trespass or trover or in any  
proper action against any stranger, who takes away  
the goods, or injures them while in possession  
of the bailor - I hope to show that this rule is  
not universal. 5 Ba 164. 260. Latet 214. 1 Roll 4.  
2 Ba 258. 3 Nemo Hist 892.

Thus if I deposit goods with  
B. & C. injures or takes them away, it may mainte-  
ain trespass or trover or any action the case may re-  
quire against C. - for as to A. has not a general property  
yet in things personal, general property draws after  
it what is called constructive property or a property  
in law - which is as effectual in law to support  
trover or trespass as actual property 2 Rol 568. 1 Lid 458

And observe  
that a right of present property in any one amount  
to a constructive property or property in law - which is  
the same thing - unless some other person is in  
actual property under colour of title i.e. adverse  
title - Thus in the case above, C. has a right  
of property & may countermand & deliver at any

any time, B. is not in actual poss<sup>n</sup> under colour of adverse title. It is therefore in constructive poss<sup>n</sup> - & one or the other is indisputably entitled to an ac<sup>n</sup> for the injury done - This I take to be the true construction & on this prin. the tailor may recover in case stated.

If a watch be delivered to a goldsmith & repaired & it be taken away tailor may maintain trespass or trover - for he has a right to counterterm and the delivery.

Sup.

Some goods to be bailed for 6 months, & then is to be paid tailor? & they are taken away within that time, can the tailor maintain trespass or trover for them ag<sup>t</sup> the wrong doer. 4 B.R. 459. 4 C. 9. 1 C. 460. Esp. D. 83. 576. & Jones 4 B.R. 1 B. 68. It is laid down in the books as a general rule, as above that tailor by virtue of his gen<sup>l</sup> prop<sup>y</sup> may maintain an ac<sup>n</sup> for violating the prop<sup>y</sup> of bailed. Now to maintain trover, it is nec<sup>y</sup> for pl<sup>ff</sup> to have prop<sup>y</sup> and a right of prop<sup>y</sup>. Now in this case, the goods being bailed the delivery is not counterterm and at pleasure tailor has not during the time for which they were bailed, either prop<sup>y</sup> or a right to prop<sup>y</sup> - so that trover cannot certainly be maintained. Neither can trespass be maintained, for that is an ac<sup>n</sup> founded on prop<sup>y</sup> - and tailor it seems has not. I suppose tailor might maintain an ac<sup>n</sup> on the case; but there is no such precise case; for here neither actual or a right of prop<sup>y</sup> is nec<sup>y</sup> - it is an ac<sup>n</sup> in consequence  
actual



action of the General Damages, & the bailor suffers  
in the loss of his reversionary interest, in conse-  
quence of the act of theft.

That in such case the bailor may maintain an  
action against the wrong-doer, there is no doubt.

But goods  
are wrongfully taken from a depository or injured  
while in his possession & bailor may doubtless maintain  
either of the actions mentioned above. & that immediately  
for he has a constructive possession - i.e. a right of present  
possession - & this rule holds I think in all cases in which  
the theft is countervailable at pleasure of bailor. For  
then he has a right of present possession 5 Ba & H. 260.  
Latol 214. 1 Roll 4. 3 Rens Hist. 392. 2 Bulst 258.

It is said in  
the books that if a bailor gives goods to a stranger &  
bailor cannot maintain trespass against the stranger or  
donee, nor in the first instance trover, that  
is he cannot maintain either until a demand  
made, when a refusal amounts to a conversion  
the right taking having been lawful 5 Bur & H. 261. 1 Roll  
505. 7. 1 Ba 237.

This would be a state case this doctrine not appear ques-  
tionable; for the delivery of the goods not itself be a breach  
of trust. In the cases cited above, of a factor's pawn,  
the goods of his principal, - it was decided prima facie  
might maintain an action against either the factor or  
pawnbroker, without intending the balance of their account  
to issue a breach of trust, a misfeasance am-  
ounting to a conversion 7 East 5.

And yet it has been determined that  
if goods be given to a stranger by a sailor & then  
be lost for them in the first instance, it will  
not lie, & still I conceive this to be a much  
more flagrant breach of trust than the former.  
These decisions cannot be reconciled with reason  
& the latter one relating to the gift was proper.

But after  
demand made & sufficient evidence of ownership ex-  
hibited, on refusal to deliver by sailor's owner  
sailor may unquestionably maintain trover.  
1 Ba 242. 1 Hall 506. 2 Ray 887. 1 Root 56.

So also it is  
admitted that most of us conceive all sail-  
ors without exception, may maintain trover  
or trover or any other proper action. The case may  
require, e.g. wrong-doers for the full value of  
the goods e.g. a common carrier, ship's carrier, agent  
broker, pawnbroker, hirer or borrower - as to these  
there is no doubt, - for in each of these cases the  
sailor as detainer himself & a stranger may  
be considered as the true owner, & in his action he is  
to declare as such - for he has a special inter-  
est or right of property & therefore see. 5 Ba 133.  
262. 2 Ray 276. 3 B. & P. 33. King 89. 1 Ld 143. 1 Mod 31.

On the  
same principle if finder of goods may maintain  
trover or trover against a stranger who injures or  
wrongfully takes them. Thus in the time of  
L. King a dog hawk found a jewel near to a



Get into the hands of a jeweller who deceived him & lost  
it for a mere song. The law goes by his next friend  
lost. Thomas v. G. the jeweller & it was sustained.  
As the law came lawfully into possession by find-  
ing - & he who has a lawful possession has a right  
to maintain the goods against all but the true owner -  
B.M. 228. 1 Str 505. 1 Ba 346. 1 Esp D. 575. 577.

Can it then be  
said, that a depository or mandatary, who holds  
by the express consent of the bailor, has less in-  
terest than the mere finder, who can recover  
by his common right of possession. & have they less  
interest or a more slender title to support an  
action?

But it is said, that the ground of every bailor's  
right to sue for the full value of the goods, in  
any action, is, his own liability to the bailor - and  
therefore it is said that a depositor or mandatary  
under a general acceptance who is liable only  
for fraud, cannot maintain an action - This  
appears to have been the opinion of Lord Coke  
& has been adopted since in most of the  
abridgements. 1 Inst 89. 2 Sid 438. 13 Ed 69. 5 Ba  
104. 5. 262.

Now in the first place as to  
this reason it is not true in point of  
law, i.e. the actual or proposed liability of  
the bailee over to the bailor is not the ground of  
his action - & if it was the ground still he would  
have a right to recover as any other bailee  
has. - For first every bailee has a special

special prop<sup>y</sup> in the thing bailed, whether he  
is liable over to bailor or not, is not material.  
It is his spec<sup>l</sup> interest; his rightful, actual  
prop<sup>y</sup> wh gives him the right of ac<sup>n</sup> as can  
be shown by every analogy in the law. 3 Br.  
392. 398. Jones 112. 10 Ba 240. There are, & many  
more might be added, shew that every fair  
man has a spec<sup>l</sup> prop<sup>y</sup>; & that, that would with  
the lawful prop<sup>y</sup> give him the right of ac<sup>n</sup>;  
see again 10 Ba 346. & it 202. 4 BR 396 to 398. Esq. 575. 577. 585. It can last with my change  
is the case of the finder. Then the language of  
L<sup>d</sup>. King is emphatical - he says if a finder has  
such a prop<sup>y</sup> as will enable him to keep the  
prop<sup>y</sup> ag<sup>t</sup> all but of true owner, - & consequently he  
can maintain trover, - & this spec<sup>l</sup> prop<sup>y</sup> wh gives  
him the right of ac<sup>n</sup> is his lawful prop<sup>y</sup> alone

But there are other analogies  
wh are very strong in favour of my opinion. By  
the St. Winchester usually called if L<sup>d</sup> of the & by  
it is settled that a sent<sup>y</sup> may maintain an ac<sup>n</sup>;  
ag<sup>t</sup> a hundred in wh he is added of his master's  
good - & yet the authorities are all agreed that  
if sent<sup>y</sup> is not liable over to his master - so y<sup>t</sup>  
here the liability is certainly not the ground of his  
right of ac<sup>n</sup> 4 Mod 404. Com. B. 527. Com 203. 12 Mod  
54.

It is also well settled if a man sent<sup>y</sup> away  
have an appeal of robbery; this is a cum<sup>t</sup>. law  
up, or appeal of felony. but yet he is not liable  
over to his master unless he is himself guilty of



Actions of the 2<sup>d</sup> of June 1869. 2d. 380. Ines  
129. 138.

So also it has very recently been decided in  
the C.B. that an uncertificated bankrupt, hav-  
ing acquired goods since his bankruptcy, may  
maintain an ac<sup>n</sup>. of trover for the goods ag<sup>t</sup> a  
wrong-doer. - In altho all his prop<sup>y</sup> belonged  
to his assignees, yet the lawful prop<sup>y</sup>  
which he had was deemed an suff<sup>y</sup> foundation for  
the ac<sup>n</sup>. B.M. 44.

Also when a house leased had been  
blown down by a tempest, it was determined  
that the lessee maintained trover for the timber or com-  
ponents or parts of the house after they were  
replaced by a tempest. Now here the gen<sup>l</sup>  
prop<sup>y</sup> was in reversion but by the tempest  
the house was converted into a chattel & of  
course into a lease; This is a very strong case  
for the lessee was not liable for a loss occasioned  
by the tempest nor was he under any oblig<sup>n</sup>  
to defend the timber & still he was allowed  
to sustain the ac<sup>n</sup>. B.M. 44. Exp<sup>s</sup> 575. 577.

It seems then that there is no neces-  
sity of resorting to the question of bailor's liability  
over in order to determine whether he can  
recover in trover or trespass ag<sup>t</sup> a wrong-doer. -  
On true ground it is as I think I have demon-  
strated, that as ag<sup>t</sup> a wrong-doer, & all others than  
the true owner the bailor is in law the owner  
& it belongs not to the deft. to say he is not.

But in the U.S. v. Grant, that  
the bailor's right of an ac<sup>n</sup> is founded on his pos-  
sible liability over to bailor, still, the depositary  
commandatory and he as much entitled to an  
ac<sup>n</sup> as any other bailor. Now when of "bailor  
liability over" is spoken of we are to understand  
that by it nothing more than his possible  
liability - for his actual liability in any given  
case cannot be tried in an ac<sup>n</sup> between himself  
& wrong doer, that is, the relative rights of bailor  
& bailee cannot be tried in an ac<sup>n</sup> b<sup>t</sup> they b<sup>t</sup>  
the act of wrong doer. & if they could it wd be  
futile, for it wd not be tried upon bailor in  
one court or on bailor in the other. - But this  
depository <sup>& mand<sup>y</sup></sup> certainly an accountable to bailor  
& may be subject to, tho they are not always  
bailor, - & all bailors of any particular class are  
not always liable. It is clear therefore that  
on this ground, the right of a depository or  
mandatary to an ac<sup>n</sup> is precisely like that  
of all other bailors.

Again, the policy of law & gen<sup>l</sup> ex-  
pediency require that every bailor whatever wd  
have a right to sue a stranger or wrong doer. -  
For it is not uncommon of bailor & bailee reside  
at a distance from each other, sometimes up-  
on diff<sup>t</sup> continents. And shall it be sup<sup>d</sup> in  
such case, if the goods are taken by a wrong  
doer, to send across the world to procure a power  
of att<sup>r</sup> from bailor to sue if wrong doer. ??



Chitty 9th

The next rule in the title might be added in aid of my argument, viz. If a bailee deliver goods to a stranger, it is an agreed point that the stranger may maintain an ac<sup>ti</sup>o against any person who injures or takes them away, but what is he but a depository? He gets an delivery to him for mere custody. This then comes directly in the teeth of all I have been writing against, 10 Ad. 41, 5 il 260. Roll 609.

It is an agreed that an auctioneer or broker may maintain an ac<sup>ti</sup>o in his own name in the contr<sup>act</sup> made for goods sold by him to a purchaser. & the rule holds altho the purchaser who owned the goods. As you know when a servant makes a contr<sup>act</sup> in the name of his master, & master & not servant must maintain the ac<sup>ti</sup>o. Mr Chitty assigns as a reason of this, that the auctioneer has an interest by way of commission, in the goods sold. I suppose however it is because he makes & contracts in his own name. 1 Chit P. 5. 1 Roll 41. 2 il 591

A portion of a factor may maintain an ac<sup>ti</sup>o against anyone who purchases of him - both reasons are doubtfully right. I also believe a broker may maintain an ac<sup>ti</sup>o for & freight. These agents contr<sup>act</sup> in their own names. As their purchasers gen<sup>l</sup>ly reside in foreign countries, they must for necessity be allowed to sue in their own names. see Post & Lev. 1a. P. 130. 1 Roll

Thus you perceive that under certain circumstances, either bailor or bailee may maintain an action against wrong doer for the full value. But sometimes either bailor or bailee may bring such an action tho' not tort. - yet it is not always that bailor may have an action. I think this qualification holds under whatever description of case may fall.

Tho' if bailor & bailee may both have a right to sue a stranger yet there can be eventually but one recovery for the full value, when then the bailor brings his action & recovers in tort or trover the whole value, bailee cannot recover in either of those actions for the full value. And if bailee has recovered bailor cannot recover at all.

The rule you perceive is not the same in both cases, the diff: arises is that after a recovery by bailor, bailee in a diff: action may recover for his special damages, but not the full value of the thing. Has been recovered? by bailor 13 Co. 59, 5 Da 105, 2 G. 3.

There is a rule laid down in Rose, that if both have an action, then 1<sup>st</sup> at the same time, he who first recovers ousts the other of his action. Now I suppose the best & more correct rule to be, that he who first commences his action for full value, will oust the other of his action of the same nature - for by commencing of action if party attaches in himself a right of recovery which he excludes the other party. & this is agreeable to analogy. see however 2 Roll 509.



*Actions of the Court*

Thus when a servant is called  
the servant, must say "I have an appeal" & say  
"I give first shall recover & prevent of others  
of his a?" 20th 559, Lutes. 117.

And if a tailor has  
received satisfaction of the wrong doer, he  
clearly cannot have an a? agt. of tailor even  
when the tailor has been in fault, <sup>as</sup> by man-  
dantly & having the goods & injury or loss. For  
the law allows of but one satisfaction for  
the same thing, & quit. of but one recovery in  
any case. L. Ray 1211, Cro. B. 24 or 35. 3 Lev 124, Lul. 11.  
Tylor 68. Cro. D. 919.

The rule as laid down is certainly  
correct but I think it might have been  
down more strongly & made more exten-  
sive. For if a tailor first commences an a?  
agt. of stranger or wrong doer, he is not factu-  
ally discharged the tailor, or in other words he main-  
tains his remedy agt. of tailor. I find no a? or  
absolute precedent for this. But if a tailor  
by commencing his suit, can preclude of  
tailor, from having one agt. of wrong doer  
it certainly ought to be the rule for it not  
to be extremely unreasonable if upon the tailor  
to an a? as the suit of the tailor, when the  
tailor himself had deprived the tailor of his  
indemnity, <sup>as</sup> by commencing & continuing  
a suit agt. the wrong doer, who by this time  
has perhaps become a bankrupt.

Decides this is supported by analogy. Thus in case of a  
maen. the ship may sue either if ship is maen. at  
her election, but if he commences an act agt the  
maen. the ship is discharged. The situation of ship  
in this case is very like that of the bailor. He is the  
keeper of a ledge viz. the ship's cargo, & the rule is  
and seem to be the same as to both. The rule is  
inferable from auct. & is laid down expressly by Exp.  
in spec. Exp. D. 510. 612. Hunt 95. Bad C. 77. 109.

and there are  
many analogous cases in wh. the party having  
his election of two remedies must abide by the  
one he chooses. Hunt also on that for & other. for  
cases see 5 Ba. 179. Dal 248. 12 Mod 663. 4.

On the other  
hand, if the bailor first commences his action  
agt. Groving does, for if full value, he makes him-  
self liable to the bailor at all events. This rule  
however presupposes that he has first commens-  
ed suit an act ipso facto ousts the other of his  
act of the same nature, & follows clearly from it - for  
if the bailor takes the remedy from bailor he ought  
at all events to be liable himself.

But altho the bailor first commences an action  
& even tho he has recovered yet the bailor may  
have a special act on the case for the special  
damage he may have sustained.

Now there are many cases in  
wh. a bailor can, & there are many in wh. he  
cannot sustain a special damage, by the injury



Actions of the 3<sup>d</sup> of the article failed, or by being  
dispossessed of it, inasmuch as they receive no  
benefit from the possession - this is the case  
with a depository & mandatary.

But not only a pawnor but a hirer, or borrow-  
er may in this way sustain great spec<sup>l</sup> dam-  
age, & for it they may maintain an ac<sup>n</sup>  
distinct from that of the bailor for the full  
value. It is observed the recovery by bailor for  
the full value does not bar this ac<sup>n</sup> by  
the bailee - There is no precise case of this  
kind, but upon prin. it is very clear, - for  
it is well established that when one does a  
wrong act involving what is called dam-  
num injuria to another, the sufferer  
may have an ac<sup>n</sup> for it, i.e. the spec<sup>l</sup> dam-  
age B. P. Rep 66.

If the bailor himself takes & prop<sup>r</sup>  
wrongfully from the bailee, as before the time  
agreed upon has expired, or the purpose for  
wh<sup>ch</sup> it was bailed is accomplished, bailee  
may have a spec<sup>l</sup> ac<sup>n</sup> on the case ag<sup>t</sup> him - for he  
sustains an injury in consequence of wrong-  
full act done in violation of the bailment.  
I apprehend however that he cannot maintain  
interest or trover ag<sup>t</sup> bailor, for there are ac<sup>n</sup>  
however the full value of the goods - tho' of  
course is laid down by L. Coke, & adopted by  
many writers since 5 Bra 145. 266. Rep D 401. 17 Q. B. 59.

Now the reason why he cannot,

cannot maintain *resp<sup>d</sup>* or *trover* is, that his special  
prop<sup>y</sup> is *q<sup>d</sup>* ground of his *act<sup>n</sup>*. & his spec<sup>l</sup> loss & measure  
of his damages. It is true that *q<sup>d</sup>* spec<sup>l</sup> prop<sup>y</sup> gives the  
lender a right of *act<sup>n</sup>* ag<sup>t</sup> 3<sup>d</sup> persons for *q<sup>d</sup>* full value, &  
as I conceive ag<sup>t</sup> them alone - as to such he is the  
true owner, & they are not competent to deny it as  
to them he has *q<sup>d</sup>* prop<sup>y</sup>, but not as to the lender.  
and there certainly is no propriety in allowing *q<sup>d</sup>* lender  
an *act<sup>n</sup>* ag<sup>t</sup> the lender to recover the full value - That  
this is the lender's relation to strangers see. *Shaw 505. Exp  
D. 575. 18eg 359. 361.*

Now as between the lender & lender *q<sup>d</sup>* lender has a spec<sup>l</sup>  
prop<sup>y</sup> entitling him to the custody. & use. & it is the  
the start of his right ag<sup>t</sup> *q<sup>d</sup>* lender

Should *q<sup>d</sup>* to *L<sup>d</sup>* Bokes rule the  
lender may bring *resp<sup>d</sup>* or *trover* & the ownership of *q<sup>d</sup>*  
or will go in mitigation of damages. but I conceive  
that such full damages are sued for *q<sup>d</sup>* is entitled  
*prima facie* to an *act<sup>n</sup>* to recover the whole value  
of goods

taken as return, it will go in mitigation of  
damages. & so in all cases when the damages are  
mitigated by any thing & post fact.

but in the present case lender had no such right  
ag<sup>t</sup> *q<sup>d</sup>* at the time the injury was done, & this is  
is what distinguishes it from other cases.

but there are still stronger reasons why lender  
cannot bring *resp<sup>d</sup>* or *trover* ag<sup>t</sup> lender, viz.  
that in an *act<sup>n</sup>* by lender ag<sup>t</sup> lender, the real value  
of the prop<sup>y</sup> furnishes no rule of damages  
even



expectations of the } even presumption - the spec. Dam-  
age may be much greater than this value - why  
then should he bring an ac<sup>n</sup> in which the real value  
is prima facie the rule of damages?

Ans. The injury may be less than the full value  
of the goods. in such case L<sup>d</sup> Coke says the dam-  
ages may be mitigated down to the actual injury,  
if it is a very awkward & incongruous mode  
of recovery.

The reason why the carrier runs for the full value  
in any case is for the benefit of bailor - but the  
carrier has run in himself by taking goods &  
has also injured bailor - so the carrier does not  
in this case run for the benefit of bailor. I make  
these observations because I think L<sup>d</sup> Bokes<sup>me</sup> is not  
correct, still, it may be, & I suppose it now is,  
considered as law - but it is clearly opposed  
to principle.

If a carrier delivers prop<sup>y</sup> to another  
in violation of bailor's orders, he is ipso facto  
guilty of conversion, or a misfeasance amounting  
to a conversion, so that trover will lie without  
demand. Trover you will recollect lies for an  
lawful user, taking & detainer, this is a case  
of unlawful user. 4 M. & S. 60. 2 Esp. D. 581.

As a gen<sup>l</sup>.  
rule bailor can maintain no other ac<sup>n</sup> except bail-  
lee than detinue or an ac<sup>n</sup> on the case. Detinue  
may be tro<sup>v</sup> but it is now disused, & its place  
is supplied by a tro<sup>v</sup> ac<sup>n</sup> on the case for

for negligence or omission of the duty required  
by law, however for which is an act on its own  
for conversion or trespass founded on  
the promise express or implied to keep with  
care & redelivery. These in ordinary cases are  
the only actions that he can bring agt of bailor  
150a 227. 8. 22 M.D. 72. Cas 1244. Cas E. 481.

when the  
goods are lost or injured by the neglect of the  
bailor, the bailor may sue him either in tort  
for the neglect, or in ass't on the agreement express  
or implied, but not in trover, for mere neglect  
can never constitute conversion, which consists  
altogether in misfeasance or a positive tort. &  
not in nonfeasance merely. 3 East 62. 1. Wilo 287.  
2 ib 319.

But in gen<sup>l</sup> the ship does not lie by bailor  
agt of bailor altho trover does, because the right taking  
was lawful so that bailor <sup>is to bailor</sup> has in this the act-  
ual nor constructive trespass.

But there is an exception to this rule. In case  
of bailor who wrongfully damages goods, and is  
liable to the bailor in trespass for by the act he  
intentionally destroys the goods or as Coke says, he  
is presumed to have received goods for the purpose  
of destroying & not for keeping them, as in case  
of an existing farmer who killed & sheep killed  
to him to pasture - (And some heard a  
case cited to this effect, that if bailor sold  
the goods. Bailor could maintain trespass, but



editions of the ~~book~~ but I never could find it '880  
146. 5th 188. Port. sec. 191. 1 Inst 57. 2 Holl 555. 2 BR 465.  
cor. to 5 Pa 286. when it is said sailor cannot  
maintain his paper in this case, it is  
not law however.

Finis. -











## Inns and Innkeepers.

This title is closely connected with the preceding, & title of Bailments in the course of which most of the principles relating to inns & innkeepers are noticed.

At. C. L. any person may & will the employment of innkeeper, in spite of number of inns. becomes so great as to lead to some injury to the public - for by the C. L. inns are established without license, but the L. Law of J. M. S. of Conn. 22, Section of most of the States, a license is now required. 3 Ma 1799. 1 Roll 84. Car. J. 544. Palm 374.

And it follows of course that he who assumes the character of innkeeper becomes liable to its duties. it. auc.

But inns or taverns, may from their inconvenient situation become such a nuisance, & if the keeper may be indicted at C. L. as a nuisance. You will readily see this cannot be the case when the taverns are licensed accordg. to L. 4 Dec 1838. Car. C. 549. 2 Mac. P. C. 174.

So also a disorderly tavern may be considered as a pub. nuisance & the keeper indicted for it as such under the name of any nuisance to the public. it. auc. 41 Haw. 198. 295.

In Conn. no inn can lawfully be est-  
ablished unless licensed accord<sup>g</sup> to § 43. & the same  
I believe in most of the States. As  
to the mode of appointment see St. Conn. 640.

And  
under our St. & keeper of inn without license  
is punishable by fine, which is doubled on in default  
in geometrical progression for every repetition of  
guilt. St. Conn. 646.

And there is now a temporary  
law of the U.S. requiring all innkeepers to  
obtain a license. it is not a law regulating  
the establishment of inns. that is left to the  
individual States. but they being, & exercising  
the employment of, innkeepers they must  
obtain a license. It is indeed one of the sources  
of revenue by indirect taxation.

Our local St.  
provide that the civil and & selectmen may  
suspend or otherwise punish innkeepers ac-  
cording to the explanation. St. Conn. 643.

Such pro-  
ceedings however do not amount to a C.L.  
process by indictment for keeping his orderly  
house. - for there is no such express provis-  
ion in our St. & C.L. rights of this kind are  
not in gen<sup>l</sup> to be created by implication

On duties  
of innkeepers, in gen<sup>l</sup> extends only to the enter-  
tainment of travellers, & the keeping their



Imposed on their goods & the animals they trade  
all rights 3 Oba 180. 9 Oba 87.

And if an innkeeper  
refuses without suff. cause to keep a trav-  
eller on reasonable price tendered - for he  
is not allowed to thrust his guest. He is  
not only liable to an ac<sup>n</sup>. on the case in  
favor of the person injured, but he is also  
liable to an indictment "for being disorderly & ob-  
stinate" "in order to frustrate the object of their invitation"  
"action" 1 Oba 168. 1 Oba 225. 3 Oba 181.

The care required of  
an innkeeper does not extend to the person of  
his guest but only to his property - that is he is not  
bound as innkeeper to protect his guest from  
the violence of others - but every body is bound  
to prevent a breach of the peace - Thus if the guest  
is beaten the innkeeper as such is not liable  
9 Oba 32. 3 Oba 181.

If an innkeeper by himself or  
serv<sup>t</sup>. deals out to his guest unwholesome food or  
liquor he is liable to an ac<sup>n</sup>. on the case 1 Oba 95.  
3 Oba 181.

The principal rules in relation to an inn-  
keeper's liability for goods of his guests have been  
presented in the title of Bailment. - for as respects  
them he is strictly a bailee - There are however  
some additional rules which I am now to notice  
his liability  
in this respect is not discharged by absence -

sickness or even insanity. This strictness is founded in policy to guard guests from fraud. His absence might be on purpose to defraud, or to avoid liability for intended mischief. His sickness or insanity might be affixed, and at any rate he is bound to provide agt. such contingencies; besides the opportunity he has to defraud & pilfer renders strictness in these cases indispensable. *Ex. C. 624. 3 Ba 182.*

An innkeeper is not liable as bailor like other innkeepers, - for he cannot make the contract of bail or implied on which all bailments are founded. He might however be subjected for fraud or violence, or any positive tort, but not for misfeasance or mere negligence - for if law will not allow his privilege to be infringed on the ground of public policy, 1 Roll 2. 1 Ba 182.

Of an innkeeper has not the convenience to accommodate, as that his house is full, & if traveller persists in remaining, & taking his chance, as the saying is. The innkeeper may be liable like other persons for positive tort or misfeasance, but he is not in such case liable as innkeeper & if the goods are taken or injured, the owner must bear the loss, - so it is in case goods are stored upon a common carrier, - for it is a loss occasioned by his own folly. *Lyer 155. 3 Ba 183.*

It has been made a question whether if when a host acquiesces his



Amos. 4. } his guest to lock his apartment &  
his goods are stolen because he did not. It  
what is liable for them? Its opinion appears to be  
divided 3 Ba 153. Eyer 265. More 78. 155.

For myself I should think he ought not to be liable  
the request is certainly a very reasonable one  
and to be obeyed. Then may be many persons in  
the house unknown to both, & if he does not  
lock the door, the host ought not to be liable  
unless it be proved that he was lying.

Merely  
delivering a key to a guest does not however dis-  
charge the host, - it is merely delivering the  
guest an opportunity to remove his goods - it  
being supposed that there is no intimation of  
danger or request to lock the door. - But it is  
too much to say a innkeeper ought to keep a  
guard over every apartment when he has reque-  
sted his guests to lock their doors. 8 Co 33. 3 Ba  
183.

And an innkeeper is liable as such, altho' ignor-  
ant of what the goods of his guest consist.  
Tho' if he were advised as to their value by mis-  
representation, I should suppose he could not be  
like that of the coin<sup>r</sup> carrier, considered above it  
anc. 5 BB. 1273. More 155

And a general innkeeper is  
liable as such only to travellers & to those who  
stay at his house in the character of guests &  
as the price usually charged to travellers, it is  
not.

not liable to his neighbors even tho' they are  
lodged in his house - as if he had loaned his hat  
or his cane. As to boarders properly so  
called, who live with him at the house charged  
at private houses - for there is no reason tho' law  
should have an higher claim agt him than agt  
any other man in whose family he may board.  
- The host in this case is not in character of  
innkeeper. & cannot be liable as such & LOCKE. 1 Roll  
3. Skin 276. 3 Ma 183.

Besides the policy of the law does not extend to  
such case for one who lives in the house himself  
in the character of boarder can judge for himself  
of the character of the innkeeper.

An innkeeper is not  
chargeable in the absence of the owner, for any  
goods for the keep of wh he acquires no profit, by the  
owners absence to him means such an absence as dis-  
vests him of the character of guest - for an innkeeper is li-  
ble as such only in consequence of the relation of inn-  
keeper & guest. 1 Roll 3. 338. Cro. J. 188. Tal 388. 5 Ma 278.  
Moyle 126. 2 Poph 179. 3 Ma 183.

But for goods for the keep of wh.  
he receives a profit he is liable altho' the owner has left  
them, & is not personally a guest - for as to the  
goods the relation does continue, as in case of a  
horse lying left by a haulier, Cro. J. 188. Lark 388.  
1 Roll 3. Moyle 126. Moore 477.

And when the goods of a man  
in the possession of another are taken by a third to his injury,



Under the inn. The keeper is chargeable to the master pre-  
siding as if of owner or master, had use of guest. But 9th  
Hyw 102. Exr 158. 5 BR 273.

As to the remedies not an inn-  
keeper is liable to his guest, I have already stated the rules pre-  
sented to you; The innkeeper may detain a person of his guest  
for his whole debt. He may leave the inn without  
paying his bill & without permission of innkeeper may  
pursue & retake him, - & I doubt not but he has a  
same remedy if a guest flies into another state for  
it has been determined in N.Y. & Con. That he may  
retake the person with a bail piece in a neigh-  
bouring state, as to Ex. rule see, 9 Roll 35. 3 Ba 145. 5.  
Cal 306. Earth 150.

He may detain the horse for the expense incurred in keeping  
of horse, but not for any other part of guest's bill - This  
is accord<sup>d</sup> to the rule as to lien on personal chattels.  
it auct.

But altho he can detain the horse of his guest  
still he cannot seize him - for he is the custody of  
of law, - is like an estray, distrip forment, damage  
per assaut &c. & if the use of horse or other animal  
the act makes him a trespass ab initio & liable  
to an action of assumpsit of guest. - for the detainer  
of an animal by an innkeeper is a trespass in invitato &  
compulsory, & licensed by law. & whenever of law gives  
a license of party abuses it he is a trespass ab in-  
itio & may be sued in the manner as if of right  
stat<sup>d</sup> had been unlawful. 30 Ba 125. 12th 556.  
Moore 277. Whistler can be sued & have it auct. *Finis*











# Actions

## Covenant Breach

In common language the words covenant contract & agreement are used as synonymous. but the word covenant in its technical meaning is a contract under seal, & it may be either by deed indented or by deed poll. - A "parol contract" in legal language is a solatium, - but the phrase is often used Fitzg. M.D. 340. Ep D 266. But Powell says a covenant & agreement are synonymous, 2 Pow 244.5

An ac<sup>n</sup> founded upon covenant is denominated "Covenant broken" - It is an ac<sup>n</sup> bro<sup>n</sup> upon a deed & claims a recovery for a breach of the cond<sup>n</sup> contained in it

When the covenant is in the form of a deed by indenture as well as in that of a deed poll, it is suff<sup>t</sup> to mention the fact that ev<sup>n</sup> sealed the deed - for it is suff<sup>t</sup> in all cases that the instrument was sealed & executed by the party whom it imports to bind. Thus if 10440 ev<sup>n</sup> by 10440 & only seals the instr<sup>t</sup>, Bonney maintains an ac<sup>n</sup> for the breach Bro Cas. Ep D 266.

The usual remedy to enforce a cov<sup>t</sup> is by an ac<sup>n</sup> at Law for damages: i.e. by an ac<sup>n</sup> of cov<sup>t</sup> broken, - the debt will

will lie in some cases, as, when the covenant is for a sum certain, or for a sum which may be made certain by reference to some known standard, but it will not lie for damages so nominal, e.g. A covenants to pay B 2  $\text{lb}$  of wheat for all the wheat B sows on a certain day. - but will lie as well as covenant broken - for the sum to be recovered is ascertained by the B<sup>y</sup> of the mills. So also if the cov<sup>t</sup> is to pay the market price for ten sheep, if a known standard is made to a known standard and to certain est. quod certum add. *potest*. But debt will not lie for so many bushels of wheat or cords of wood &c. - but cov<sup>t</sup> broken will lie. - 1289. 1289. 1289.

The usual remedy in Equity is an action at Law to recover the damages for the breach of covenant, but when the cov<sup>t</sup> is to do some specific act, as distinct from the paying of money - as to convey or purchase land the most effectual common & appropriate remedy is by a bill in Equity for a specific performance see *plus Novus of Chan<sup>y</sup> pa.* 41 Foulle 27. 129. 136. 138. 526.

But as a general rule when a compensation for a breach of cov<sup>t</sup> lies in damages only, or in other words, when damages will be an adequate compensation, a bill in equity will not lie for a specific performance of cov<sup>t</sup> - for when  $\text{res}$  & case relief may be had at law as well as in equity, and it is a well



Equity, Broken rule both in Eng. & this country, & when an adequate remedy is afforded at Law, a bill will not lie in Eq. - And as it is as a general rule it is not the province of the Court to award specific damages - so that both these reasons combine to confine the cases to the Act of Law. 1 P.W. 670 2 Bro Ch 341. 1 Fon 1024. 139.

This rule however is not universal, for even when the damages are adequate & indeed are the only remedy, still if the remedy sought is merely consequential or collateral to a ground of relief cognisable in Equity, the covenant may there be enforced, as, when in the language of the rule, "matter of fraud is mixed with the damages," i.e. when fraud becomes connected with the damages, the court here will be enforced in Equity, tho' nothing but damages can be recovered, as suppose A brings an act. of covt. broken at Law for damages, & B files an injunction alledg. fraud in obtaining the covenant, & then files a cross bill denying the fraud & praying relief; here if the fraud is not proved, B will enforce & covt. - for as B. had taken C. out of the Law by a false suggestion it is reasonable & equitable the business should be completed & A. not be driven back again to his Law. The case is sent to Law to determine of damages - & the decree then awards the damages given in the verdict 1 Eq. Ca 17. 134 69. 526. 2 Pow. C. 216.

Of the different kinds of Covenants & how created

It is to be observed that under & head there are several coordinate divisions; The first is divided into two kinds, Covenants in deed & covenants in law; A covenant in deed is an express mention or recital in the instrument itself between the parties; And here now proper I think to call this an express covenant & Co 30. Cap. L. 266.

A covenant in law is one raised or implied by Law, This with more propriety may be called a implied covenant, & thus content distinguishes it from an express covt., e.g. If A. makes a lease to B. for a term of years. & there is nothing to limit the Land, it implies a covt. in the lessee, & lessee shall have quiet enjoyment during the term. This covt. of quiet enjoyment is implied from the fact of the deed being made & Just 384. Cap. D 266

The specific diff. between these two covenants is this, A covt. in deed is founded on the words used in the instrument amounting to an express agreement, & it is not material that the words used are the most apt, appropriate and suitable to express the intention of the parties, say A. lease so much land to B. "yielding payg." & receiving so much rent; the covt. here



Lease Broken } here arises out of a lease, & of  
the fact that it is to pay the rent men-  
tioned

Covenants, both in law, are raised not all from  
the words of the instrument, but from the  
nature of the contract or agreement, & if  
one makes a lease thus "I give, have, demise  
farm let &c &c &c" (copy of the lease &c), it  
imposes a covenant in law that the lessor has  
a good title & that the lessee shall have quiet  
enjoyment; but in the construction of long-  
ways these words do not import no such  
thing. But if the lessor is evicted or the lessee proves  
to have no title the lessor may maintain  
an action on implied covenant. 4 Co. 130. 5 Co. 17. 10 Co.  
96. 1 Ch. 519. 2 Mod. 91. Palm 315

2. All covenants  
are either Real or Personal

A covenant real is  
one, by which one binds himself to pass or  
secure things real, as lands tenements or  
hereditaments, as a covenant of well seizen or  
of warranty for defense of property

A personal covenant on the other hand  
is one, which is either conveyed to the person  
or concerns a personalty, of the former is  
a covenant to do some act of service for another  
of the latter to pay a sum of money &c 1 Inst.  
109. 2 Co. 266. 294. 5 Co. 16. 17. Fitzg. 145. 242.

This division of covenants

cont<sup>g</sup> you precise is denied from a reference to  
the subject of the cont<sup>g</sup> as the former decis-  
ion was from a reference to the nature of a  
cont<sup>g</sup>.

As to the ~~meaning~~ <sup>structure</sup> of Covenants it is to be  
observed that no set form of words, no techni-  
cal language is necess<sup>y</sup> in any case to make  
a cont<sup>g</sup> - any set of words which shew the con-  
currence of the parties in the agreement is suff<sup>t</sup>.  
1 Burr 290. 1 Rol 548. 1 Liv 47. Went 11. 1 Ba 527. Thus  
if A lease to B. rendering, yielding, & reserving, so  
much rent, tho' these words are considered as 4  
words of the lease himself, still the lease  
by accepting the lease makes it cont<sup>g</sup> & not  
by them his own, & tho' there is no express  
agreement the words are consid<sup>d</sup> as evidence  
of the intention of the parties, & as such  
bind the lease 1 Powl 442. Cav Eq 02. 1 Fowl 379.  
Now I am aware that Mr Powell calls this  
example a constructive cont<sup>g</sup> event. but I  
demonstrated to you under the title of  
Contract, that there was no such thing.  
Williams in his notes to Lamm. Rep. calls it  
an implied cont<sup>g</sup> which is equally incorrect as may  
app<sup>r</sup> be shown by a demonstration - for were there  
nothing in it than alone, but "I give grant lease  
ise to the lease and he bound to pay no rent  
his whole allegation depends upon the words  
"rendering yielding & reserving" & the alleg<sup>y</sup>.  
Depends upon this, makes it an exp<sup>t</sup> cont<sup>g</sup> & not  
24/1/1811.



*Structure & Prob*  
The subject of a covt. may be  
either past, present or future; Thus if a covt.  
covt. with his actor, that he has destroyed the  
land he held agt. him - now if he has not  
destroyed it he is as imputed guilty of a breach  
of covt. If a grantor or lessor makes a covt.  
of well service, it is a *present*, and some  
see<sup>d</sup> contracts, & covts. of warranty are de futuro.  
How 938.

Covts. in law may by *express covts.* be  
restrained or excluded, or in other words when  
from the nature & genl structure of a covt.  
a covt. in law will be raised it may be qual-  
ified or excluded by an *express covt.* - as if in a lease  
a *presum* *fact* *taetum*; Thus if a lease  
is made in *gent terms*, an covt. for quiet enjoy-  
ment is raised, but if the words "give grant lease &c"  
are followed by others restrain<sup>d</sup> or exclus<sup>d</sup>. the legal  
implication, they will affect it to the extent  
of their import. - for this is the manifest inten-  
tion of the parties *Year 175. 2 P. 273. 410800. Prob*  
939.

It has been said, that on the implied warranty  
raised from the words "give grant, lease, &c." no  
act will lie agt. covt. for eviction by a stranger  
- the rule as *express* is certainly not law, &  
the mistake arises solely from the *expression*.  
It relates merely to tortious entries, & evic-  
tions; for if the stranger enters under a better  
& an elder title, the covt. is certainly liable as

as an insurance on his covenant. Cas C. 214. Esp.  
D. 258, L Co 30.

I observed above that no particular  
form of words was necessary to make a cove. I  
add. That, if a clause is inserted in the form of  
a mere recital of a former agreement, it  
creates a cove. on which an action will lie, Thus  
in a deed between A. & B. a clause is added, "Whereas  
it is agreed that A. shall pay B. £100, for service  
done, & the aforesaid B. do cove. to serve him  
a year." There is not only a cove. on the part of  
B. to serve A. but also one on the part of A. to  
pay B. his hire. - I am express cove. 3 Rich 465. -  
1 Leon 122. Esp D 258.

But as to covenants in deed if the  
word "cove." is not used there must at least be some  
words which import an agreement, or no cove. will  
be created. I have already remarked that the word  
used need not be the most apt appropriate &  
short, Thus if A. agrees to repair the house  
provided B. or furnishes the timber. There is  
no cove. on the part of A. to furnish the timber  
for there are no words of comp. act  
But on the other hand if the words <sup>are</sup> "That A. or  
shall repair the house, provided it is ag-  
reed B. or shall furnish the timber." B. or  
will be bound to furnish the timber, & as upon  
added words "it is agreed" create the cove. 1 Broth 578  
1 Sid 48.

and whenever there is a clause in the deed



Discharge of Covenants and in the nature of a mere discharge it can never amount to a covenant in law as in the case above, that Lessor will repairs provisions Lessor furnishes the title timber, now here Lessor is not bound to furnish the timber, & if he fails to deliver the timber Lessor is discharged of his liability.

If a Lessor executes a collateral bond condition for the performance of the covenants or other agreements in addition the bond stands as well to implied as express covenants. As, if a bond is made in the usual form "I give, grant lease &c." The covenants are twofold that the Lessor has good title & that Lessee shall have quiet enjoyment - & if at the time of making a lease Lessor makes a bond as above, he binds himself for these implied covenants as much as for any express covenants which may be inserted in the lease & so forth.

### Construction of Covenants.

On this subject a general rule is that covenants are to be expounded liberally, i.e. the meaning & intention of the parties is to be sought in those that strict adherence to particular & artificial rules or the letter of the instrument, requires with a view of consequence, or deeds, as grants &c. *1 Christ 45 b. 1 Plow 140, 1 Mol 419*

Hence in many instances a literal performance will not avail the party - for there must be a form

performance accord<sup>d</sup> to the spirit of the cov<sup>t</sup>.  
i.e. a substantial perform<sup>t</sup> of the gen<sup>l</sup>. intention  
of the parties. Thus a covenant to deliver a  
bond to C. B. wh he held ag<sup>t</sup> him & to deliver  
it within 20 days, in the mean time C.  
reud upon the bond & reuend. & then  
delivered it to B. within the time stipulated.  
here now was a literal perform<sup>t</sup> of cov<sup>t</sup>. but not  
a perform<sup>t</sup> accord<sup>d</sup> to intent<sup>n</sup> of the parties wh  
doubtless was that the bond was to be deliv<sup>d</sup>  
up to be cancelled. & the alleg<sup>r</sup>. to the King  
mishid 1 sid 48. Cas D 270. 1 Ba 559.

So also when a free cov<sup>t</sup>.  
to have all the timber upon the land, he  
cut it down & then left it on the ground  
held to be a breach of cov<sup>t</sup>. as cov<sup>t</sup> to intent<sup>n</sup>  
of the parties Ray 404. 1 Wm 276. Cas D 271.

So also if one cov<sup>t</sup>. to deliver  
a piece of cloth in a given time & in the  
mean time cut it to pieces & it is a breach &  
the delin<sup>d</sup> cov<sup>t</sup>. is liable upon cov<sup>t</sup>.

So when a brever cov<sup>t</sup>.  
to deliver all the grains wh were thrown out  
of his barn & previous to the delivering  
then he mixed a sheaf with them whereby  
they were spoiled. he was held liable for a  
breach of cov<sup>t</sup>. ibid. Pin 740 1 Ba 440. 429.

But on the  
other hand a substantial performance is  
suff<sup>t</sup>. tho it is not literal. Thus when a  
cov<sup>t</sup>.



Construction of Con. & Broken with the fact that his son who was under the eye of consent and marry his daughter & he did marry her, but on coming of age of consent he dissented to the marriage & court was fulfilled, - for it was fulfilled as far as it had been contemplated by the parties, as it is impossible for the marriage of parties under the age of consent, not to be voidable. Lev 52. East 246.

When the words of a contract are certain & cannot be absolutely ascertained; the construction is to be taken most strongly against the court & of course most favorably for the party & this is a general rule governing all contracts. Thus when in a mortgage settl. a cov. to pay the intended purch. £20 p. ann. without limits any time, the Ct held he shd. pay it for & life of the purch. 1 Lev 102. 1 Sid 151. 1 Rep 241. 1 Ba 589.

If one covenants to convey land to such an one on such a day & before that day he conveys it to another, he is ipso facto liable on a breach of covt altho the time stipulated for the perf. has not arrived, & he is liable immediately altho he may at the time appoint for perf. to be able to fulfill & covt. - for it is a general rule of whenever one vol. disposes himself to perform a covt he has in legal contemplation broken it by 15. 5 Co 212. Moore 315. 3 Ld. 1 Johns 522. 5 Co 110.

So if a man should want to day to convey  
his house to B. 3 years hence & should tomorrow  
have it down, he would become liable the moment  
of destruction, for he disallows himself the  
possession of control. & access.

A clause in the form  
of an exception in a lease in some cases amounts  
to a covenant on the part of Lessee & it often  
it does not. The distinction is this, When  
the lease is of a given subject containing  
a clause excepting a certain part, the  
exception is not a covenant, not to occupy himself  
or disturb the occupation of Lessor. Thus  
a lease is made of a farm excepting a par-  
ticular enclosure; now if Lessee takes possession  
of that enclosure he cannot be sued on his  
covenant, but he can & must of necessity  
all be said in trespass. The exception amounts  
to a covenant that the excepted enclosure shall not  
be possessed by the lease & so makes him a stranger to  
that enclosure, so that should he afterwards  
claim it the exception may be plead in bar.

But on the other hand when the exception  
is of profits or of something which is to be derived  
out of or issue from the thing demised, it  
does amount to a covenant not to occupy or  
disturb the occupation of Lessor. Thus if  
lease to B. an enclosure excepting a right of  
way or easement the exception amounts to a covenant  
on the part of Lessee that Lessee shall enjoy this  
right.



Construction of Court } right of way. This rule is not at  
all inconsistent with the former, for here the lessee  
is not a stranger to the thing excepted as he in  
the former case he was, for here the subject is  
conveyed to him out of what the easement, or  
thing excepted is to arise, there the subject its  
self was not conveyed, but excepted, Card E 690. 637.  
Comm. Dig. Waste. C. 2. 1 Roll 434 Carth 232. Dal 196. Now C. 138.

There is a P.

to be a diff<sup>r</sup> between express & implied contracts in the respect that the former are construed more strictly than the latter; as in the case given in Conk. & sea capt. cont. to be in Wingaw I.C. at a certain time - the time was suff. for him to have performed the voyage in, but was thwarted by head winds & hard weather, - altho prevented from fulfilling his contract by the act of God, still he was held liable - for he is considered in such case as an insurer of the voyage - for such is the manifest intention of the Car. Ins. Act 837. 859. 859. 859. 859. 859. 859.

Also if one makes an absolute & unqualified cove. to pay rent for a certain buildg. for a given time, & if during that time the building is burnt, & if burnt even by lightning he must pay the rent for the remainder of the term, - for it is presumed that he & put to pay the rent in such cases, or he wd have qualified his cov. in the 103. 1 Br 10. 708. 2 Bay. 417. 1 Gould 366. Ex D 278. -

Whether a Ct of Equity and under such cir-  
cumstances relieve the life has been a great  
subject of debate, but never decided & left  
in one instance, 1 Ch. Ca 183. Anbl 519. In one of  
these cases an opinion was exp'd in favour  
of life; L<sup>d</sup> Chan<sup>l</sup> Osley decided in his favour  
see Bull 366th, 71.

It seems to me that upon prin. Ch. cannot  
interfere in such cases - Ch cannot control  
the law, its province is to give relief in those  
cases in wh there are circumstances not  
contemplated by the framers of the law, & in  
wh a decision accord<sup>d</sup>. to the rule of law would be  
oppressive; But here the rule of law was made  
for this precise case; if then the Ch decides in  
favour of the life it sets aside its contract the  
law, - say<sup>g</sup> it is a rule of Equity, that where ever  
the equity is equal the law shall prevail -  
Suppose now the lease of the house had been  
for 50 years, now for this time the prop<sup>r</sup> & poss<sup>r</sup>  
on both the life for the same time; - the house  
is burnt for a short time after the making of the  
lease, here then the rent must be lost by  
either the lessor or life; there is no equity that  
the life should lose it rather than the lessor  
for he suffers suff<sup>t</sup> in sustaining his reasonable  
top. & as life did not qualify his cov<sup>t</sup> he should  
be held liable for the rent. - I think therefore that  
L<sup>d</sup> Osley is wrong upon the principles both  
of law & equity, the case seems to be a hard



Construct<sup>n</sup> of Covert<sup>s</sup> } one at first view but it is not  
upon reflection. -

In case of implied cov<sup>t</sup> such accid-  
ents will excuse the cov<sup>t</sup>. Thus in case of  
a lease, the lessee need not be held liable upon  
his implied cov<sup>t</sup> for quiet enjoyment of life  
if the house leased by him be destroyed by light-  
ning. And under this cov<sup>t</sup> & prop<sup>ty</sup> state it be  
not be liable in such case. 2 Burr 1609. 1 Dougl  
266. Doug 259.

Many examples in illustration of this rule occur  
under the title of bailment, where you will recollect  
the implied engagements to return & goods bailed  
are not construed so strictly as a prop<sup>ty</sup> engag<sup>t</sup>. -

This is a gen<sup>l</sup>  
rule that the perform<sup>t</sup> of a prop<sup>ty</sup> cov<sup>t</sup> is not discharged  
(in the language of the rule) by any "collateral mat-  
ter," as in case of an unconditional cov<sup>t</sup> to pay  
rent during the continuance of the term  
now if an accident happens destroying the  
subject of the lease (as a house), the accid<sup>t</sup>  
is the collateral matter, & tho it deprives &  
value of the benefit of his lease still he is not  
discharged, from his liability to pay rent. -  
Esp 270.

Exceptions, to this rule, are 1<sup>st</sup> If one  
cov<sup>t</sup> to do an act at that time lawful, &  
a subsequent act is made rendering the act  
unlawful, the cov<sup>t</sup> is discharged. Tho it  
is here the collat<sup>l</sup> matter, e.g. A cov<sup>t</sup> to

to sail on a certain voyage in a certain time  
& before that time an embargo is laid  
the court is annulled - for if Court makes the voyage  
he will break the law for which he is to be liable  
to punishment and the law will not punish  
a man for not doing that, for the doing  
of which he is to be punished. Cal 198. Exh 2478.

This rule discharge of Court is not at all in-  
consistent with our constitutional provis-  
ion that the const. of individuals shall not  
be impaired by Law. - for that provision re-  
lates to laws made for the very purpose of  
impairing the const. & here the interference  
of the law is merely consequential, & are

2<sup>d</sup> If one  
Court not to do a thing & a Lt afterwards  
alleges him to do it the allegation is annulled  
the Court we suppose to be lawful at the time  
of making it the Lt. and make no diff.  
Thus if Court to serve Lt. a year & a subsequent  
Lt. makes it his duty to serve in the army  
- he is discharged by the collat. matter it are

3<sup>d</sup> If how-  
ever one Court not to do an act at the time  
unlawful, a subsequent Lt. merely making  
it lawful does not annul of Court - for the  
Court & Lt are not at all inconsistent, one  
may be performed without violating the  
other 1 Cal 198.

It is a general rule that Court respects  
any



Construct<sup>n</sup> of Cov<sup>ts</sup> } any particular subject, are  
confined in their operation to the subject in  
being at the time of making of cov<sup>t</sup>, Thus if  
upon cov<sup>t</sup> to pay all the taxes on the land, &  
cov<sup>t</sup> extends only to those taxes wh were then  
in being & not to those wh are afterwards  
imposed, Or if he cov<sup>t</sup> to pay all the taxes  
& the hearths at that time alone are taxed  
he wd not be liable for the taxes afterwards  
imposed upon lights, tho he wd for those after-  
wards imposed upon the hearths. Liv 68. 1.  
Vent 222. 3 DR 977. 2 Stra 1191.

If a person to whom  
an obligation is given assigns it by deed to  
another, the assignment raises the implied  
cov<sup>t</sup> that assignee shall have the liberty of  
collecting it in the name of assignor, &  
having collected it shall have the whole ten-  
e of it himself, but in gen<sup>l</sup> at least choses  
in ac<sup>n</sup> are not assignable & assignee cannot  
collect them in his own name. But the  
assign<sup>t</sup> being by deed the above cov<sup>t</sup> is raised,  
so that if assignor collects & det<sup>r</sup>mines or  
prevents the collection by assignee or releases -  
as he may do by law - he is liable on his  
breach of cov<sup>t</sup>. 1 Par. C. 317. Sal 125. Chit B. 109.  
L Kay 5<sup>th</sup> 1242. 3 Kulle 304. 2 Vern 540. So also in case  
of a promise, ap<sup>ts</sup> may sue him for a breach of  
promise

In our usual practice has been for ap<sup>ts</sup>

assignee to sue assignor at law in an ac<sup>n</sup> on the  
case for the price - and the law now is that  
if the orig<sup>l</sup> debtor neglects or permits the assignee  
to pay the assignee after the assignment, the assignee  
be liable in the same ac<sup>n</sup> of price, but of  
is not the Eng<sup>l</sup> law & I take it not the law  
of any of the States where there is a Ch<sup>l</sup> of Ed.

A writ in

indeed cannot be pleaded in bar of an ac<sup>n</sup>  
on a cov<sup>t</sup> in another deed, unless the former  
is in the nature of a discharge or release  
L'vent 17. 2p 2905

But a discharge in another  
deed may be pleaded thus if A. give a  
deed to B. & then to give one to C. assuming  
that on such an event the former shall be  
void - Now if that event has happened C.  
may plead it in bar of an ac<sup>n</sup> by B. on  
the former deed. Cal 579, 575. Cas 8426. Cas. 9300  
Ch. 3 Cal 298.

There also a cov<sup>t</sup> by a cov<sup>t</sup> not  
to sue his debtor for a given time is no  
bar to an ac<sup>n</sup> by the said cov<sup>t</sup> within that  
time but in such case the cov<sup>t</sup> need be  
liable for damages on his breach of cov<sup>t</sup> - the  
cov<sup>t</sup> can't be pleaded in bar for if it can  
it must be in effect to go forth a release  
for that period, but if it is a release at all it  
is so forever, - for a personal right once sus-  
pended is for ever gone, & this is not the in-

vention



Construction of Gov. <sup>of</sup> intention of the parties  
Nov 10. 2 W. & W. 100. Carth 63. Tol 573. Ray 187.  
293. 413. 2 Pow. C. 255.

But if such covt not be  
me for a given time makes a part of  
the orig<sup>l</sup> covt<sup>l</sup> and upon, as a clause un-  
derwritten, or memorandum endorsed  
it does prevent the right of an action  
until the time specified has elapsed  
Thus it gives a prom<sup>t</sup> note, "for value an<sup>d</sup> I promise  
to pay it" with a clause underwritten that it  
shall not run on the note within  
one year from the date of it, now here  
no ac<sup>n</sup> can be supported on the note 'till  
the year has elapsed, - for the note and  
mem<sup>m</sup> taken together constitutes but  
one instrument, & as such being con-  
strued, it amounts to a note of hand  
payable at one year after date, 8 B. 483.  
Esp 2905. 6 B. 737. 2 Ray 590. 1 Lev 152.

And it is a  
genl<sup>l</sup> rule that one covt may be pleaded  
in bar of an ac<sup>n</sup> on another covt in the  
same deed altho there are no words of  
discharge in the case, etc in the last  
& ample the ac<sup>n</sup> on the note being covt<sup>l</sup>  
within the year is defeated by a plea of  
the clause underwritten - for the sense  
of an instr<sup>l</sup> is to be collected from a consid<sup>n</sup>  
of all its parts. Or if a paper covt to pay

pay \$100. for rent, & upon court that he may  
retain \$50. for repairs, now if having  
paid the rent \$50. he brings his ac<sup>n</sup> to  
remove the remaining \$50. the court  
pleads the ac<sup>n</sup> in bar it is an. Moore 879.

The rule that  
a court not to sue for a limited time. does  
not operate as a release applies it no other  
than personal ac<sup>n</sup> & right for with person<sup>al</sup>  
rights, a temporary suspension & an extinguish-  
ment, but with real rights it is not so  
therefore a court not to assert a real right, for  
a given time is a good bar to an ac<sup>n</sup> but for  
it within that time & 444.

But a court not  
to sue at all is reg<sup>l</sup>. pleaded as a release. It  
is a complete bar, 8 Ed 352, 10 M 446. 9 Ed 176. 486.  
1 Roll 239. This rule is assigned to prevent  
a multiplicity of suits all tending to produce  
the same effect, for if a court, "never to sue"  
cannot to sue at all, was then a court, "may"  
it is not bar the ac<sup>n</sup> but the court, and in some  
& then be obliged to refund in an ac<sup>n</sup> on the court  
by the action, who and leave the parties  
in statu quo, except that two bills of costs  
have been paid, one by each & no end at  
all gained by it. To avoid this the law consid<sup>rs</sup>,  
that gen<sup>l</sup> release as a release, & it is one of 4  
cases in which an instr<sup>ment</sup> of one form is made  
to take effect as if of another 15 R 446.



Constructing

But a cov<sup>t</sup> not to sue at all, one of several, joint & several debtors, is not bar to a suit ag<sup>t</sup> the others, & it is doubtful whether it is, ag<sup>t</sup> cov<sup>ee</sup> himself. 2 Ray 590. Holt 179. 8 ER 155, 171. 11 Mod 234. 12 id 551. The reason of this rule is because the cov<sup>t</sup> is not contained as a release, and it differs from the preceding case when there was but one debtor on the ground of the intention of the parties - & here it is evidently the intention of the cov<sup>t</sup> not to release the debt, but only to stipulate not to sue the cov<sup>ee</sup>. & thus he had a right to do, & to sue only one of the debtors as the debt is several as well as joint. But if cov<sup>ee</sup> is damaged by the suit he may recover his damages, in an ac<sup>n</sup> on the cov<sup>t</sup>.

If a cov<sup>ee</sup> is made to one of several joint debtors not to sue him, I trust it will release the whole - for here it will seem to be the intention of cov<sup>t</sup> to abandon the whole debt - for here all the debtors must be joined in the ac<sup>n</sup> therefore a release of one is a release of all - in that it is, this can differ from the former - But this is not settled in the books.

Sho' a cov<sup>t</sup> not to sue within a limited time is not bar, still if such a cov<sup>t</sup> is made, & the cov<sup>t</sup> at the same time grants, that if cov<sup>ee</sup> is

is said within that time he may plead  
the cert. or acquittance in law. - the cert. will  
be a bar - for here are words of discharge  
the acquittance is not absolute, but dep-  
endent on the cond<sup>n</sup> of suit being bro<sup>t</sup>  
within the time limited Earth 54. 211. Const  
123. 1. Show 56. 33 0. 250. Holt 519.

A cert. not to sue one  
in a foreign country is a good bar to a suit bro<sup>t</sup>  
in a foreign country. This is not an absolute but  
a local release, so when the dutch master of a  
dutch ship agreed with their dutch master  
not to sue him in any other country than  
Holland - & they sued him in Eng. The Ct of  
Q.B. held the ac<sup>n</sup> not to lie, but this on prin-  
ciple of Q.L. not at all interfere with a suit  
by them in Holland 2 Wils 603. 141. 2. Ray 598. Com.  
R. 139. 2. Lat 295.

Such cert<sup>s</sup> as these are al-  
lowed by the Law, because in themselves they  
are consistent with good Policy & perfectly rea-  
sonable, e.g. If two individ<sup>s</sup> & two N. I. for  
Europe, & they have each demand to ag<sup>t</sup> each other  
such an agreement not to sue is just & in con-  
venience, by preventing a suit between them at a  
distance from their funds their resources &c. &c.

But a cert<sup>s</sup>

By one includ<sup>g</sup> himself from resort to the proper  
Cts of his country is void 2 Wils 606. For this  
is opposed to good Policy & is nothing less than  
an agreement to renounce the protection of



Construct<sup>ion</sup> of the laws: Indeed it is upon  
this ground that a mutual & amicable  
submission of parties to an arbitrator  
is recalled - it is not indeed void, but it  
may be revoked, but if the award is once made  
it is then binding: This case does not go to  
the whole extent of the rule, - & it ought not  
for arbitrators are very temporary, - tho' the  
Acts of justice are lasting, the proper means of making

### Covenants in deed of Conveyance.

In all deeds of con-  
veyance & gift quitclaims, more usually called releases  
than are usually two cov<sup>ts</sup> either expressed  
or implied viz. 1<sup>st</sup> Cov<sup>t</sup> of seisin, or of good title  
in Cov<sup>t</sup> & 2<sup>d</sup> Cov<sup>t</sup> of warranty, or that the cov<sup>ts</sup> shall  
jointly imply the subject conveyed; the first is no-  
thing more than a cov<sup>t</sup> that he has a good  
title, & the 2<sup>d</sup> that he will protect & defend  
it & his heirs.

When there is no such express cov<sup>t</sup> in the deed,  
the words "habere, tenere & concepi &c" used in  
the deed will imply both the above cov<sup>ts</sup>,  
unless there is something else in the deed  
to exclude or rebut the implication. 1 Roll.  
519. 520. Eq 257. 2 Mod 92. Esp 2268 to 2268.

A cov<sup>t</sup> of seisin

is a cov<sup>t</sup> de presenti, or it is an assurance  
that cov<sup>ts</sup> is seized or has a good & suff<sup>ic</sup> title  
to make the conveyance. If he has not such

such title, he is liable instantaneously for a breach  
of covenants. And grantee may sue before suit  
to maintain the act it is sufficient to show  
that grantor was not lawfully seized, or should  
damage need not be alleged or proved *Case* J  
170. 369. 9 Geo. 50. Exp 2494.

It says that in an act upon a covenant of seisin it is  
sufficient to allege that debt was not seized, with-  
out showing who was, - the contrary has been  
held in *Don.* but the rule is well settled, for  
in declaring upon the covenant it is, "that  
I am well seized," it is sufficient to negative it  
which is by averring the contrary; If debt proves a  
prima facie title in himself at the time  
it then puts itself upon showing a higher  
or better title in another, & if he does not show  
such title in another, he must fail in his  
suit, for the contrary of debt does not show a  
prima facie title, he must suffer judgment. *ib. ante.*  
The covenant

of seisin is broken not only by a total defect of  
title, but also by an existing incumbrance  
on the land, in case that incumbrance is ex-  
cepted, as in case of a mortgage being upon the  
land conveyed *3 East 491. 4 Peters. 76.*

In this case, however, when the trust consists  
in a mere incumbrance, the trust must  
be laid specially by showing the ground of inter-  
ruption or the nature of the incumbrance  
it is not sufficient to show, as in the former case



But in Deeds case, merely that grantor is a good title, for here <sup>as</sup> the cov<sup>ts</sup> takes the affir-  
mative on ones fact: he ought so to say  
he case that def. can learn its true nature  
& traverse it precisely 2 Br & C. 423. 7.

at cov<sup>ts</sup>

of warranty or if quiet enjoy<sup>t</sup> in Grantor, on  
the contra, is a cov<sup>t</sup> de futuro. viz that grant<sup>r</sup>  
will defend & that grantee shall enjoy quietly.  
grantee cannot sue upon this cov<sup>t</sup> until evi-  
ced, & it must appear in the de<sup>c</sup> that he  
was evicted by a person claim<sup>g</sup> not only under  
a title, & by a lawful act, but also that he  
claimed under a good & elder title. 4 Br & C. 1  
Mod 292. 4 Br & C. 400 15. 1 Br & C. 6. 277. Esp 2001.

Merely alledg<sup>d</sup> that the eviction was by one  
having lawful right & title is not suff<sup>t</sup>  
for the title may have been derived from self.  
himself; Thus A conveyed to B. & B. to C. & C.  
evict B. now B. has a good & lawful title  
as B having given him that title cannot sup-  
port his ac<sup>t</sup> ag<sup>t</sup> C. for an eviction under it  
1 Sid 166. 2 Saund 177.

It must appear then in the  
de<sup>c</sup> that evictor had an elder & higher title  
than grantor is, that was conveyed to grantee  
thence an allegation in the de<sup>c</sup> that the  
eviction was by suit is not good, indeed  
this is a weaker title than any others - for  
yes is no title at all, for the suit may have

must be accounted by default, collusion, false  
evidence, mistake &c. 2nd E. 914. 48006. 1 Pard. C.  
374. 418. 404. 389. 9.

There is however no particular  
or technical form of words necessary to be used  
in alleging elder title, if it but appear in  
the ou<sup>er</sup> that the eviction was under elder  
title it will be sufficient, 2 Lev 37. 4 5th 614. 3rd  
212. Exp D 204.

Now is it necessary to state under  
what title the eviction was, i.e. it is not  
necessary for ev<sup>ee</sup> to deduce the title as that  
eviction was his at law to get or claim as  
the devise, or under a prior conveyance from  
grantor, or ev<sup>ee</sup> 2 Lev 47. 4th 614. contra 2 Saund  
177. 1 Lid 466. In Saunders the judges are made  
to say by the language of the reporter, that  
the pl<sup>ff</sup> must show under what title the  
eviction entered; now this language of the  
reporter is a denial of the rule but it  
certainly is not law if it means more  
than that pl<sup>ff</sup> must show evictor had an  
elder or higher title.

The reason why the evictor  
must be alleged to be under any title at  
all, is because the ev<sup>ee</sup> of warranty does  
not extend to the tortious act of others; grantor  
does not cov<sup>ee</sup> that the house shall not  
be burnt by a felon, he answers not for  
the crimes of all mankind, in such case



Can in ~~the~~ <sup>the</sup> can grant must take his own  
age of the wrong done. Lth 400. 388. 554.  
421. 519. Rob 34. Est D 273. 301.

But a grant may  
properly act up the tortious act of 3<sup>d</sup> persons  
for a man by his own vol<sup>ty</sup> act & for suff<sup>ty</sup>  
consid<sup>n</sup> may subject himself to any degree  
of responsibility even for inevitable accidents  
but in suit can ~~not~~ <sup>not</sup> ~~not~~ <sup>not</sup> ever that  
the action was under any title at all  
Est D 270-4.

It has been decided that a cov<sup>ty</sup> ag<sup>t</sup>  
eviction by the act of a particular per-  
son extends to the tortious act of 4<sup>th</sup> per-  
son. Thus, a cov<sup>ty</sup> is made to warrant & def-  
end ag<sup>t</sup> all claims & demands of J. S. it  
has been decided that if J. S. evicts cov<sup>ty</sup> <sup>either</sup>  
with or without title, that cov<sup>ty</sup> is liable  
Rob 199. Cro E 212. 1 Phil 413. Lth 400.

This rule is founded upon the supposed  
intention of the parties, - & has been hon-  
ored down by one case after another, with-  
out being questioned - but I cannot think  
such can be the intention of the parties  
but rather that the cov<sup>ty</sup> was a qualifica-  
tion than an extension of the gen<sup>l</sup> im-  
plied cov<sup>ty</sup>. so that cov<sup>ty</sup> was to be liable for  
the act of J. S. & the cov<sup>ty</sup> was to take the  
risk ag<sup>t</sup> all others; If this is not acceded to  
it is certainly straining the construction  
very

very much to render him liable for the  
acts of J. S. — It is a mere rule of con-  
struction, & the question is one of the inter-  
pretation of the parties.

But if J. S. himself  
dictates grants even by a tortious act  
under claim of title, he is liable upon  
his covenants. In such case J. S. need not  
state affirmatively that there was an assertion  
of right.

And tho' the covenants are properly lim-  
ited to lawful evictions, still if cov't  
exists under a tortious act, he is liable.  
He is held liable, as it were, by estoppel  
for he cannot defend himself by al-  
leging his own tortious act, altho' it  
does not come within his covenants. 1 S. R.,  
871. 2 Roll. 212. 2 Show 425. Esp. D. 272.

And the  
rule is the same as to all persons included  
in the covenants as heirs, &c. & all repts. of grantor  
it are.

In case of a lease, an eviction by J. S.  
himself suspends the rent, but a mere  
trespass does not. — there must be an eviction.  
Cov. 242. In the first case, the act of J. S.  
is a breach of covenants & therefore discharges the  
obligation of J. S.; In the second being but a trespass is no  
breach of covenants, so does not suspend or discharge  
the



Executors in Trust the oblig<sup>n</sup> of the testator, and this rule extends to representative of grantor, & to every person included in the will. Dyer 257 b. 1 Roll Rep. 21. Esp. 2. 302.

If the 2<sup>d</sup> heirs be not named in the will, it is the same thing - the testator binds them all one.

A will for quiet enjoyment made by an ex<sup>r</sup> as such is restrained to themselves & the persons claiming under them, - hence to subject them the breach must happen by, or in consequence of, an act of the ex<sup>r</sup>s themselves i.e. it must arise directly, or indirectly from their own act. Thus if Ling possessed of a term for years dies, the term being a chattel interest, it devolves upon his ex<sup>r</sup>s. If they assign it to a court for quiet enjoyment, now they will not be liable unless & in so far as directly or indirectly by the act of ex<sup>r</sup>s themselves. Shep. 5763. 1 Roll 34.

It is a little difficult to be satisfied that of construction is accord<sup>d</sup> to the intention of the parties, but there is a technical reason for it, as I suppose, viz. An ex<sup>r</sup> when he acts as such, he covenants & is liable, only in his representative capacity, & so he can be considered of course only as assigning his testator's right, & so makes no warranty except as himself. If he does more than this he acts in his individual capacity, & is liable then as such.

Rule of damages on Covenants of Seisin & of Warranty.

It is

rule of damages on a covt. of seisin is different from that on a covt. of warranty. And the rule in Con. as to the latter is diff. from the Engl<sup>h</sup> rule.

On the covt. of seisin when the ~~Plff~~<sup>successor he recovers</sup> the consid<sup>n</sup> money & the interest, 2 Mass. 433, 446. 4 ib 108. 1 Root 108. 2 ib 294. 4 Johns. 5 ib 49. 3 Gaines 111. 4 Dall 115. 1 Tel. N. D. 551 m.

The interest in this case is computed, I conclude, from the time the consid<sup>n</sup> money was paid, if not, from the time it drew inter-est; he recovers the price of the land at the time the covt. was made - for it was broken so instantly. - This rule is the same in Con.

On the

covt. of warranty, the Plff if successful recovers in Eng. the consid<sup>n</sup> money paid with the interest & all the damages of eviction i.e. the costs of suit by which he was evicted. But he recovers nothing for the improvements made. This rule has been adopted in the supreme Ct of N. York, as see 3 Gaines 111. 4 Johns. 1. 3.

An an ac<sup>n</sup> on the covt. of warranty in Con. Plff recovers the value of the land at the time of eviction, together with his damages of eviction; This is also the rule in Mass. 2 Mass Rep. 440. 3 ib 543, 546. Kirby 3.



Rule of damages

I suppose I am much inclined to think that upon prin. our rule is the correct one, there are the covt. of war? If it recovers the value of the prop<sup>y</sup> at the time of eviction, that is, at the time the covt. is taken this preserves the analogy between this and former case of covt. of seisin; for there the If it recovers the value at the time of mak<sup>g</sup> of covt. at the time it is broken. For the breach is co instantaneous with the mak<sup>g</sup>. But at any rate in a country like ours where the value of land is constantly rising, our rule is the only one that will do justice between the parties; But in Eng. & indeed in all old countries it is not material whether If it recovers according to the value of the land at the time of mak<sup>g</sup> the covt. or at the eviction, for the value seldom varies, & then but slightly, & from accidental causes. But with us the variation is great, & usually in improvement of the value & surely justice requires that he sh<sup>d</sup> recover according to the value at the time of eviction as that value has been increased by his own industry & influence.

On a covt. of seisin, the assignee of covenant is a subsequent purchaser, cannot maintain an ac<sup>n</sup> on the covt. agt the orig<sup>l</sup> grantor. Thus if A grants to B, & B to C. & both with covt. of seisin C. cannot maintain his ac<sup>n</sup> on the covt. agt. A. tho' he can agt B. for

for the cov<sup>t</sup> was broken so instantly in wh<sup>o</sup>  
it was made it therefore became a chose in  
act<sup>n</sup> in the hands of B. wh<sup>o</sup> by the C. L. is not  
assignable; but if C. did see it it wd be making  
the chose in act<sup>n</sup> negotiable; wh<sup>o</sup> is contra. the  
rule of the C. L. 2 Rep 489. B. M. R 158. 159. Esb D 2 95.  
3 Johns. 1. also so decided in Com. Sup<sup>r</sup> Ct. Taylor vs.  
Tiffany

But upon a cov<sup>t</sup> of warranty the assign<sup>ee</sup>  
the cov<sup>t</sup> could maintain his act<sup>n</sup> agt the orig<sup>l</sup>  
grantor, or agt the cov<sup>t</sup> if he assigns with war-  
ranty, for now the cov<sup>t</sup> is broken, - as it is  
repudiated in his own time i. e. there was  
no right of action until the estate came  
into the hands of assignee 5 C. 156. 172. Chit.  
D. 3. 11. 1 Inst 384 b. Sheph 198. B. M. R 158. 9. 3 Johnson  
441. 5 ib 120.

But an intermediate assignee, who  
has not been evicted, or subjected or sued, or any  
ways damaged by a subsequent assignee,  
cannot recover agt the orig<sup>l</sup> grantor, - for if  
he do recover, grantor might be subject to an  
indefinite number of act<sup>n</sup>s; but when assignee  
has been thus damaged as he may be when  
he may recover agt the orig<sup>l</sup> grantor, 1 Com. R. 244.

In such  
case however, on the cov<sup>t</sup> of seisin I can conceive  
the first cov<sup>t</sup> might upon pain, recover  
nominal damages agt the first cov<sup>t</sup> - for if  
cov<sup>t</sup> was occupant, broken during his time  
being.



Assignment being broken as instant in the mode  
& ag<sup>n</sup>. This right of ac<sup>n</sup> is not negotiable, it  
has not been, & cannot be, transferred, so I think  
he must recover, but as he has received no  
damage he shall transfer the estate, the dam-  
age will be but nominal

To an orig<sup>n</sup> ac<sup>n</sup> on  
the cov<sup>t</sup> of s<sup>u</sup>sin the def<sup>t</sup> having acquired title  
after the ac<sup>n</sup> bro<sup>t</sup> is no defence. Thus if A  
conveys to B. with cov<sup>t</sup> of s<sup>u</sup>sin, & A. has & so  
title, B. sues him on the cov<sup>t</sup>, now if B. pur-  
chases the prop<sup>y</sup> from D<sup>t</sup>, the ac<sup>n</sup> it will  
not avail him. - for at the moment the  
cov<sup>t</sup> was made B. right of ac<sup>n</sup> was consum-  
ed, & when a cov<sup>t</sup> is once broken, the law al-  
ways presumes damage. - The subsequent pur-  
chase of the title is but a graft upon the old  
stock. - It is the case and not to be diff<sup>r</sup>  
if the purchase was made before the ac<sup>n</sup>  
was bro<sup>t</sup> but after of cov<sup>t</sup> was made, 5 Johns.  
49. 4 East. 504. 3 BR. 186. 2 Saund 171. But doubt-  
less this acquisition of title will go in miti-  
gation of damage & perhaps there will  
reduce them to nominal

If ejectment is bro<sup>t</sup>  
as<sup>y</sup> granted by one claiming under a higher  
title, def<sup>t</sup> sh<sup>d</sup> for his own security, notify  
grantor, that he may appear & defend, this  
when the estate or interest in question is  
a freehold is called, vouching in the grantor.

When he is thus vouched in, & does not appear granted must defend as well as he can. 3 Bl 299. 2 Roll 396. Gill E 28.

An *Comm*, 90 vouch<sup>r</sup> is used as well in judgment as his *replevin*, as well when the interest in question is a chattel as a freehold. - And I see no reason why the rule sh<sup>d</sup> be limited to freeholds as in Eng. 1 Inst 101. 365 a. 1 Ba 523. Peak E 39.

The partic<sup>r</sup> form of giving this notice in Eng. I am not acquainted with, but ours I suppose is not much unlike it, which is a kind of summons called a writ of voucher, giving notice to vouches of the existence of the suit & naming him to appear.

I observed that deft sh<sup>d</sup> vouch in the grantor for his own security. He is not obliged to do it, for he is as capable of defending as the grantor. But if he does not vouch him in, grantor is not concluded by the judgment may be given ag<sup>t</sup> deft. So the title is still left open to discussion & grantor may still prove title in himself. But if he is vouched in, whether he appears or not, he will be concluded by the judgment. - Gill E 28. Yelv 22. 1 Roll 396. Peak E 39. 1 Ba 532.

Quitclaim deeds, or as more usually called releases, contain neither of these coven<sup>ts</sup>



Quitclaim 3 cots. of wh I have been speaking i.e. of said  
or of warranty, for if it contains either of these  
either expressly or implied it is not a quitclaim  
Ch. 21.

It has been often decided that the quitclaimant may  
be held liable in an action upon the case for fraud, for  
any defect of title or even quality of the sub-  
ject conveyed; But in a late case (Sammon  
vs Stenwood) it was decided such an action  
will not lie unless there had been a conspiracy, for the  
purpose of cheating & paying 12%.

The Eng. rule amounts  
to the same thing. It is said, If a man purchases  
new land & takes a release, he cannot maintain  
an action on the case for fraudulent representation  
- for if he wd secure himself in such an  
event, he must insert the proper cots. in the  
deed, for to the title deed reference must be had  
to settle all such questions. But in case of  
fraud the purchase of free property such an action may  
be maintained. See 21 R. 118. Cro 9195. 386. 3 & 4 R.  
51. or 89.

It seems however that this rule is not fully settled  
in Eng. - for Margrave in his Notes to 1 Inst. holds  
that the action will lie for the fraud & up to 1 Inst.  
384a, n. see in doctrine Cruise D. tit 38. ch. 3, sec 57. 1 Foul  
366. 2 Barnes 393.

In this state very many of these actions  
have been maintained, wh arose out of the rage  
for land speculation, about the time I came into

in a practice; much land was then sold & sold  
the vendor giving quitclaim titles, making fraud  
as to the quality of the land, making the  
best of the good can never make any  
covenant. Now admitting the Eng. rule to  
be correct in Eng, still in a country like this  
were the lands lie at a distance & are in  
the market, - the opportunity of fraud is  
so great, that the a<sup>n</sup> for fraud & rep<sup>n</sup> and be  
maintained. Indeed were the remedy to be  
drawn only from the title deeds it would be  
unposs<sup>ble</sup> to introduce a new covt.

Of covenants to pay money by installments.

When a  
land conditioned to pay an aggregate sum  
at diff<sup>t</sup> times, the a<sup>n</sup> of debt<sup>in</sup> in failure  
of payt<sup>mt</sup> of the first installment & accord<sup>g</sup> to the  
Ct. the whole aggregate sum i.e. the whole  
finally is recoverable, see 118. 1 Wils 300 &c. Str  
515. 414. Car. 1, 558. Esp D 205. see directly the contra  
1 Inst 476 292. 10 Co. 128b. Cussory must here  
deal with this latter auc. soon after my ad-  
mission to the bar, but at that time I ventured  
to suggest that they must refer to single bills.  
At this opinion I have since found is accord<sup>g</sup> to  
of opinion of Prof. Buller - see Mel. 1 Wils 548.  
Esp D 205. B.M. R 158.

There is no doubt but the law is, as I have asser-  
ted it & indeed the nature & construction of the



Contract of the kind is sufficient to divide it, the  
law is to this effect, "And he an. paid & finally  
found he ~~to~~ <sup>\$1000</sup> ~~to~~ in the sum of." Now here  
is an absolute debt payable instantly but  
then a cond<sup>n</sup> is annexed, "That if the debt shall  
pay \$100 at the end of one year, & 100% at the  
end of every successive year for 9 years, the  
obligation shall be void." Now here the cond<sup>n</sup>  
of its being void is, that he pay all & every  
installment at 10, 20, 30, &c. &c. &c. lie on the first trans-  
action or failure

But in case of a single bill, debt  
will not lie until failure of pay<sup>t</sup> of the  
last installment, i.e. until all become due, as  
see 1 Mass. 501. & this is what is meant by the acc<sup>t</sup>  
of Case 1 Ch. 486. 2926. 10 to 1288. Exp 205. The reason  
of this is, that the aggregate sum of \$1000  
is entire & indivisible there cannot be ten  
acc<sup>t</sup>s of debt maintained on this complete  
bill, & there is no penalty or cond<sup>n</sup> annexed  
w<sup>h</sup> can create a forfeiture of the whole  
on failure  
of the pay<sup>t</sup> of any or each installment - And it  
is the penalty - w<sup>h</sup> is the forfeiture of the whole  
debt, - for w<sup>h</sup> the acc<sup>t</sup> is lost in the former case.

By the St.

of Con. as to suits on bonds payable by install<sup>t</sup>s, the  
Sts of law are allowed to chance the damage, so  
that pl<sup>ff</sup> recovers only his actual damage, e.g. to the  
the case above, if pl<sup>ff</sup> claims the first installment  
he may under the St recover it, but he may not

measures that alone; and then he may bring  
his sci. fa. on that judgment & have it ex<sup>te</sup> for the other  
install<sup>ts</sup> to his parties they become payable - but  
this is a mere statutory regulation & is the reverse of  
the C.L. 10 Don 35-6.

But on the other hand if  
rent is reserved at the rate of so much per an.  
payable by quarterly install<sup>ts</sup> - debt lies for each  
successive pay<sup>mt</sup>. - This differs from & can of a  
single bill in this that rent is considered  
as a reservation of part of the issues of the  
land - & of that part we shall have secured  
on the day of pay<sup>mt</sup>. - The year is merely a mea-  
sure & furnishes a ratio or proportion. But  
the great legal feature of debt is, that the debt  
quarterly reservations are in the nature of  
distinct debts - not so in the former cases. En-  
dowed if a lease is made for 10 years reserving rent  
payable quarterly it would be oppressive to keep  
before out of it till the end of the term. 3 Co  
22. 10 it 128.

On a count or note for the pay<sup>mt</sup> of an agree-  
gate sum by install<sup>ts</sup> an ac<sup>ti</sup> of cov<sup>ty</sup> broken or  
a promissit on the case may be maintained  
as often as the install<sup>ts</sup> become due, - But  
debt upon the cov<sup>ty</sup> or no - will not lie  
until all the install<sup>ts</sup> are due. - Cro E. 175.  
776-867. Cro J 105. 5 Co 22a. 4 it 94b. 8 it 153. Sal 165. B.  
M. P 106. 1 Wm 547. contra the first branch of the  
rule see Cro E. 117.



Installments - One can perceive the rule is  
diff. as it regards Penal bonds, single bills  
& notes or cov'ts. & upon the subject the law  
presents a painful mass of confusion, the  
reason of this confusion is that, proper dis-  
criminating language has not been used  
in distinguishing between Penal bonds &  
single bills, & between cov'ts & single bills, so  
that the precise rule of damages has not been  
ascertained.

To repeat the rules then. Upon a Penal bond  
for the pay't of an aggregate sum by install'ts,  
debt will lie on failure of pay't of g<sup>l</sup> part in  
install't. As to a single bill, it will not lie  
until all the install'ts become payable.  
On a note or cov't cov't taken, or apt. will lie  
to recover each successive install't as it becomes  
payable but debt recovers only what is payable.  
But debt lies not till all become payable.

Now this diff<sup>y</sup> arises from the forms of  
the ac<sup>ns</sup> & their diff<sup>y</sup> provisions. - Cov't when  
s<sup>g</sup> apt. on bond to recover damages or loss actual-  
ly sustained & no more. But debt is to  
recover a sum certain in number. Cov't  
so then will lie for the recovery of the first  
install't - but debt will lie only for the re-  
covery of the whole debt i.e. not until all  
the install'ts are due; or the pay't has been  
accelerated by a forfeiture of a penalty as in  
the case of a Penal bond - The single bill comes.

comes under the preceding clause. —

If there is  
a cov<sup>t</sup> or note to pay several sums at diff<sup>t</sup>  
times & there is no aggregate, an ac<sup>n</sup> of  
cov<sup>t</sup> broken will lie & other quotes, and I  
conceive that debt<sup>r</sup> will also lie, tho' I know  
of no such precise case e.g. A cov<sup>t</sup> to pay  
B \$ 10. the 1<sup>st</sup> of June & 10 of 1<sup>st</sup> of July &c. &c. now  
there are not properly install<sup>t</sup>s. but are  
distinct debt<sup>s</sup>. That cov<sup>t</sup> broken will lie for each  
sum follows from the rule above. — but see  
B.R.P. 158. Cro E 118. 776. 807. 1 Kex 550. 1 Chuz 292 &  
Now when there is no aggregate it can make  
no diff<sup>t</sup> whether the sums to be paid were  
in one instrument or in ten. And the  
diff<sup>t</sup> between this & the former case consists  
in this that here there is not one debt wh<sup>ch</sup>  
is divided up into several pay<sup>t</sup>s but there  
are several distinct debt<sup>s</sup>. — I therefore think y<sup>t</sup>  
debt will lie for each — but I have no ac<sup>e</sup>  
for the opinion. —

A clause in a cov<sup>t</sup>. That on  
non-pay<sup>t</sup> of any one install<sup>t</sup> the whole debt  
shall immediately become payable, is good.  
Chit B 212. D. Car Cro 9505. there appears to be a  
diff<sup>t</sup> of opinion, but I conceive the rule to be cor-  
rect as laid down —

Mem. Judge Gould suspends the action in con-  
sequence of raising blood, May 14<sup>th</sup> 1817



The Rights & Liabilities of g.<sup>o</sup> Representatives is the  
universal original basis in the action

on the large

way of the C.L. the personal rep.<sup>o</sup> of Gov.<sup>o</sup> as his Ex.<sup>o</sup>  
Ad.<sup>o</sup> are implied in himself. The meaning of  
the rule is that they are bound as a matter of  
course & without being named, by those covenants  
by wh. he himself is bound. This rule however  
is not universal 1 Roll 519. 2 B. M. 197. 1 Inst.  
8. 149.

Fiduciary covts. are exceptions to this gen.<sup>o</sup> rule, i.e.  
where there is a personal confidence reposed in g.<sup>o</sup>  
Gov.<sup>o</sup> or party contracts etc in case of an indenture  
of apprenticeship, the Master w.<sup>o</sup> to instruct  
the app.<sup>o</sup> Now if the Master dies his Ex.<sup>o</sup> is not  
bound to instruct the app.<sup>o</sup> for he may not  
be capable of doing it, & the a. per. confid.<sup>o</sup> was  
reposed in the Master as to his capability which  
is not transmissible 1 Roll 553. 1 Sid 216. Com. D.  
Gov.<sup>o</sup> C. L. 2 Inst 269.

But the a. per. rep.<sup>o</sup> of Gov.<sup>o</sup> is liable even  
in the case of fiduciary covts. if the covt. was  
broken in the life time of Gov.<sup>o</sup> for immediately  
upon the death of the Gov.<sup>o</sup> a right of a. per. accrued  
ag.<sup>t</sup> the Gov.<sup>o</sup> & this claim is ag.<sup>t</sup> the a. per. fund. g.<sup>o</sup>  
as this fund goes into the hands of the a. per. rep.<sup>o</sup>  
his Ex.<sup>o</sup> or ad.<sup>o</sup>, the rep.<sup>o</sup> is liable, as was if the  
covt. is broken after Gov.<sup>o</sup> death. Com D. Gov.<sup>o</sup> C. L. -

In an action raised in fee may find his heir at  
Law.

Law by a Covt. Thus if A. covt. to convey land to B. at a given time & dies before that time, B. will compell the heir to perform the Covt. - In genl the consideration money will go to the Ex<sup>r</sup> of A. 2 Vern 213.

Indeed it is a genl rule that covt<sup>l</sup> shall bind the heir of covt<sup>l</sup> & so on the other hand descend to the heir of covt<sup>l</sup> as in this last case if covt<sup>l</sup> should die before the time of performance, his heir could enforce the covt. 2 M.D. 158. 1 Roll 320. 2 Sids 343. 2 Sids 294.

And the heir of covt<sup>l</sup> may sue upon a covt<sup>l</sup> made tho' not named in the covt<sup>l</sup> if the covt<sup>l</sup> runs with the land & was intended to continue after, & is actually broken after covt<sup>l</sup>'s death. Thus if a lease covt<sup>l</sup> with lesor to leave the land in repair & before the expiration of the term the lesor dies now if at the expiration of the term the land is out of repair the heir of lesor may maintain an ac<sup>n</sup> on the covt<sup>l</sup> ag<sup>t</sup> lesor - for as the breach happens after lesor's death the heir is the person injured 2 Lev 92. Skin 305. 2 Sids 294. 296.

Ag<sup>o</sup> if A. covt<sup>l</sup> with "B & his heirs &c" for quiet enjoyment even in a covt<sup>l</sup> made as of an inheritance & the covt<sup>l</sup> is broken in the life time of B. (covt<sup>l</sup>); Ex<sup>r</sup> & not of heir of B. has the ac<sup>n</sup> on y<sup>e</sup> covt<sup>l</sup> - and this is the case even tho' the Ex<sup>r</sup> was not named in the covt<sup>l</sup>, the diff<sup>o</sup> between this & the former <sup>case</sup> is that, In the former the covt<sup>l</sup> was not broken





And the ex<sup>r</sup> will be ag<sup>t</sup> the Ex<sup>r</sup> of Co<sup>r</sup> on an ass<sup>t</sup> count if the count is taken after Co<sup>r</sup>'s death, provided the Co<sup>r</sup> is ex<sup>r</sup> p<sup>r</sup>es<sup>t</sup> - for by the first gen<sup>l</sup> rule the p<sup>r</sup>erog<sup>atives</sup> of Co<sup>r</sup> are implied in himself & this is on the principle of privity of count the count being ex<sup>r</sup> p<sup>r</sup>es<sup>t</sup> - 1 Roll 519. Com. D. Co<sup>r</sup> & Co<sup>r</sup> 8. 553.

But upon an ass<sup>t</sup> in law is an implied count & not taken till after Co<sup>r</sup>'s death the Ex<sup>r</sup> is not liable ex<sup>r</sup> p<sup>r</sup>es<sup>t</sup> & a breach of the implied count arises from the words "I give ground" - Ex<sup>r</sup> not liable, tho if the count was ex<sup>r</sup> p<sup>r</sup>es<sup>t</sup> he wd be liable but here there is no ex<sup>r</sup> p<sup>r</sup>es<sup>t</sup> count & the right of recovery is founded upon a privity of estate wh the Ex<sup>r</sup> is not, the liability follows the estate into the hands of the heir & 20 E 157. 102a 533. Dy 257.

If an Ex<sup>r</sup> or Co<sup>r</sup> comes into possession of a lease of a term for years by virtue of his representative character, he may be considered as an ap<sup>ee</sup> of the term & as such sued & so described in the declaration, for he in such case is virtually an ap<sup>ee</sup> by operation of law, but he is here liable only for the breaches wh accrue during the continuance of his own possession, for he is liable only on his privity of estate 1 Sal 309. Esp. D. 296.

It is a gen<sup>l</sup> rule of the C. L. that the heir at law of Co<sup>r</sup> is liable for the breaches wh accrue either before or after Co<sup>r</sup>'s death if the heir is named in the count & has a real ap<sup>ee</sup> from Co<sup>r</sup> but his liability extends no farther than the ap<sup>ee</sup>, 1 Boull 357. 1 Inst 355.



Chap. 4. of Rep. 365. 371. 372 384. 2 Ed. 378. Chap. 2 294.

I understand

since tho' it is but a rule of practice, that to an  
ad. agt. the heir at law for a breach of the covt.  
of his ancestor, infancy is no bar, for the heir  
is not sued upon any contract of his own, but upon  
that of his ancestor who was sui juris, & he cannot  
be made personally liable but only as to the property  
wh. has descended to him; & on that account 4 B.  
Rep. 77.

In Conn. the Act makes a peculiarity as to the  
liability of these Rep. And it has once been decided  
(many years since) that the heir at law as such is  
liable at law on his ancestor's covt. of assise if named  
in the covt. & having by the descent. The principle  
of this however seems questionable to me. Of the  
Eng. rule I do not complain it is a good one, but  
this rule in Conn. is contrary to the whole genius  
of the Conn. st. law. for this law makes it not  
only the duty but the exclusive duty of the Ex. to  
discharge all the outstanding claims agt. the  
estate; he acting under the direction of the Ct.  
of Probate, then as this covt. of assise if broken  
at all is broken during Covt. life, the heir cannot  
under this st. be liable - The decision cannot  
be Law.

As to breaches of covt. of war. when the breach  
happens after the death of Covt. then can be no doubt  
but the heir at law is as much liable in Conn. as at  
Eng. for here the st. does not interfere but leaves it  
as at Eng.

*Of covenants which run with the land & of collateral covenants.*

A cov<sup>t</sup>. is said to run with the land as I understand it, when when the oblig<sup>n</sup>. made by it passes upon the assign<sup>t</sup> of the int<sup>ty</sup> so as to devolve upon and bind the ass<sup>ee</sup> or in other words it passes with the title.

On the other hand there cov<sup>t</sup>.s do not run with the land i.e. do not pass with the int<sup>ty</sup> are call'd collateral.

Out of this distinction there arises a difficulty as to the liability of the assignee as to cove<sup>y</sup>. upon cov<sup>t</sup>.s used in conveyances.

The first gen<sup>l</sup>. Rule is, that the ass<sup>ee</sup> of a lease &c. is liable for the breaches happening during his own poss<sup>n</sup> or time, even tho' not named, provided the cov<sup>t</sup>. runs with the land.

But if the cov<sup>t</sup>. is collat<sup>l</sup>. the ass<sup>ee</sup> if not named is not bound, / Foul<sup>d</sup> 345.

The ensuing q<sup>n</sup>. arises in what cases does the oblig<sup>n</sup>. pass with the int<sup>ty</sup> & what not, & this it is essential should be understood.

It is first to be observed, that when the thing cov<sup>d</sup>. to be done or concerning which something is cov<sup>d</sup>. to be done was in esse at the time of making the cov<sup>t</sup>. or issues out of the subject cov<sup>d</sup>. about, the cov<sup>t</sup>. runs with the land. Thus if I lease a house to B. who cov<sup>d</sup>. to repair, this cov<sup>t</sup>. runs with the land, for it relates to something in esse at the time of making the lease viz the house, and if B. sh<sup>d</sup>. assign to C. C. w<sup>d</sup>. be liable for all breaches occurring



~~Covt. Coll. & Court with Land~~ during his time & the rule holds that the apique is not named in the covt. 1 Roll 521. Bro C. 457. 5 Co 106. 2 Ha. C. 4 Co 30.

So also a covt. Lind. & Eper to pay rent is said to run with if land for tho' in fact it is not in epe at the time of making the lease, still in legal language it is potentially in epe - for the land out of wh. the rent is to be paid is actually in epe - So that ap. is liable for what rent accrues during his time Bro C. 388. Moore 357. B. & P. 157.

But on the other hand if the thing to be done or concerning wh something is to be done was not in epe at the time of making the lease or was not parcel of the ~~the~~ subject land the covt. ~~was~~ is collateral, & of course according to the distinction above, the ap. is not bound by such covt. unless named, not in some case if named. Thus suppose B the ap. in G. to build a wall or more, of a certain time & in the mean time the apique to C. is not liable unless named for the covt. is absent it relating to a thing not in epe at the time of the lease but to be created afterwards 5 Co 106. 2 Bur. 1241. 3 Br. 393. Bro C 552. 1 Ba 534.

Contains a covt. wh goes to the support or preservation of the thing demised runs with the land, & the ap. is bound tho' not named, if this description is the covt. to repair, but not a covt. to raise a new buildg.

If if lease and cov<sup>t</sup> to leave yearly so many acres  
of land uncultivated, the cov<sup>t</sup> and run with the  
land. - for it goes to its preservation, & that  
shd app<sup>e</sup> though a greater quantity than stipu-  
lated, he wd be liable 3 Lev 288. 5 Co 17. 18. 24 & Cro.  
Jac 125. Ray 303. 2 Vent 228. 232.

When a pignus are named  
in the cov<sup>t</sup> they are in gen<sup>l</sup> & liable to perform all cov<sup>t</sup>  
whether they run with the land or not. 5 Co 116. 1 Bac.  
534. Thus a lease being made by A. to B. for 20 years for  
himself & assigns to build a wall upon the land  
within 10 years, B & assigns to C. If C. holds at the end  
of the 10 years he is bound to build - for his acceptance  
of a lease in wch he was mentioned binds him  
since the cov<sup>t</sup> relates to the thing demised

But a cov<sup>t</sup>  
to bind the app<sup>e</sup> in such case must be to do a  
thing which relates to the thing demised other-  
wise the app<sup>e</sup> is not bound tho named in the lease  
Another word he is not bound to do an act foreign  
to the thing demised, as if the cov<sup>t</sup> to build a wall  
upon other land than that demised, to the app<sup>e</sup> is  
not bound to perform

The rule is the same if g<sup>o</sup>  
orig<sup>l</sup> lease cov<sup>t</sup> to pay a collateral sum i.e. a  
sum in prop<sup>y</sup> & distinct from the rent. 5 Co 116 &  
Cro. J. 438. 1 Gould 352.

The reason why the app<sup>e</sup> is not bound in these cases by  
the cov<sup>t</sup> is, that there is no privity between him  
& the g<sup>o</sup> & wch as to estate, there is none of cov<sup>t</sup>



Gov. Pollard v. Allen? with land? he is a perfect stranger to the cov<sup>t</sup>, there is a privity of estate between them inasmuch as he takes the int<sup>ty</sup> estate, & so is liable only for the cov<sup>t</sup> as to that estate, so as to an act done on a tract of land diff<sup>t</sup> from that devised he has no interest & no concern, as build<sup>g</sup> the wall, or pay<sup>g</sup> more than the rent, it is foreign to the thing devised - Such a cov<sup>t</sup> by life as to the ap<sup>te</sup> are of no more effect than cov<sup>ts</sup> in other deeds.

But when the ap<sup>te</sup> is bound by the cov<sup>t</sup> accord<sup>g</sup> to the destinations above taken, he is liable only for the breaches which occur during his own poss<sup>n</sup> or continuance of his own title, & if a breach happen before the ap<sup>te</sup> the ap<sup>te</sup> is no case liable for it even tho' named in the cov<sup>t</sup> - for his liability is derived solely from his privity of estate, & at the time of the breach he has no such privity, Case of rent living in arrears 2 East 575. Holt. co. 177. Talk 199. 3 Bur. 1271. La Hay 338. 1 Foul 356. Doug. 443.

Said the reason of his liability is privity of estate, or in other words he is bound when bound at all only because he takes the interest to wh<sup>ch</sup> the cov<sup>t</sup> are attached of course his liability is co-existent with his title or interest, & neither commences before or continues after that interest. As if A cov<sup>t</sup> for himself & assigns to build a house on the land within 10 years, now if after the expiration of that time he assigns to B. not having built the house, B. is not liable, but A remains liable, for a complete right of ac<sup>ty</sup> had accrued

Before the assignment. it, anc. -

and ag<sup>n</sup> as anticipated  
the ap<sup>n</sup> is not liable at law, for any breach occurring  
after the assign<sup>t</sup> of his own interest. This rule is so  
strict that ap<sup>n</sup> is not liable for any part of the  
rent if he assigns but the day before it becomes  
due, the subsequent ap<sup>n</sup> is liable for the whole, etc.  
suppose the whole year's rent to become due on the  
1<sup>st</sup> May & he assigns the 30<sup>th</sup> of April, East 177. Darg,  
735. 38022. 1 talk 31. Paw. M. 90. Bnd 159 4 mid 71. ap<sup>n</sup>  
is not liable for the rent in this case, because no  
part of the rent is due until the day of pay<sup>t</sup>  
arrives, & on that day the whole aggregate sum  
becomes due but not a fraction of it before  
rent cannot be apportioned

This rule however does not apply to  
Lease, for if he assigns as in the case above, he is  
liable for the whole rent upon his express cov<sup>t</sup>  
however distant may be the time if it is not  
paid by the ap<sup>n</sup>

Chancery in favour of the ap<sup>n</sup> is so  
rigid as to protect him even tho he assigns to an  
Assignee, and it is said even if he does it for  
the purpose of defrauding the lessor of his rent.  
Suppose now he assigns by a sham convey<sup>n</sup> to a stranger  
& remain in poss<sup>n</sup> he wd be liable, he being considered  
as not having assigned, I shd suppose that the prin<sup>l</sup>  
of fraud wd render him liable in the former case  
as to the rule the anc. are not agreed Ambl. 485.  
Stra 1211. Mot. 42. 166. 1834. P. 2. see contra & that the



Gov 2 Collar & Co 5 the apt by fraud is no protection  
1 Vern 339, 331. as in this case if the apt signs  
by fraud, fraud may be set aside, but this I doubt  
except in the case of fraud on the legatee.

If apt signs to a tenant, who cannot lend her  
self to pay rent, the rule will be the same, Doug,  
435 or 452. the reason is that apt is liable only on his  
priority of estate, which is a point of very great im-  
plication; tho it sometimes makes the cases some-  
what hard.

but it seems that a Ct of Equity will oblige the  
apt to account for the rent wh accrued during  
the time he enjoyed the land i.e. he will be com-  
pelled to pay pro rata 1 Fonll 357 & 1 Vern 37-8. 165.

Whether a Ct of Eq<sup>y</sup> can under any circumstances restrain  
a person from signing to an indenture for the purpose  
of a fraud? the law seems not to be settled tho it has  
been moved, whether he wd be subjected after the  
appt is another question. It is difficult to find  
a principle upon which such restraint can be im-  
posed; for a Ct cannot say you shall trade or deal  
with such & such persons. - 1 Atk 219. 1 Fonll 351.

If an  
apt is evicted of a part of the premises or subject  
demised; he is compellable even at law to pay  
rent for residue of which he remains in possession  
& for this purpose the rent may be apportioned, &  
if the apt is evicted of 50 acres out of 100. which were  
leased

leased, he must pay rent for the 50 acres which he remains in possession of. 2 East 575.

Why it may be asked may not the rent be apportioned in the case when the assignee assigns shortly before the rent became due, as when he remains in possession 11 months out of 12. It is because no part of the rent had accrued while he was in possession the day of payment not having arrived, - which reason does not apply to an eviction of part of the premises.

So also if the original lessee is evicted of a part of the premises he may in an action of debt for rent be compelled to pay rent for the part which he remains in possession of, but not in covenant broken 3 B & A. 2. 2 East 574. The reason of this diversity is, that debt for rent when covenant against eviction or assignment is founded on the privity of estate, and may be apportioned to the quantity of estate occupied, but the action of covenant broken is founded on the privity of contract, & in an action on a personal contract of that kind there can be no apportionment.

It was formerly doubted whether a covenant by lessee not to assign his interest was binding or not, & this was founded on another doubt whether such a covenant was not inconsistent with the nature and incidents of such an estate but of late it has often been decided that such covenants were binding, & if properly framed the estate will be forfeited by a breach 2 Eq. Ca 100. 3 Wils 207. 8 a. w.



600<sup>th</sup> Collat<sup>n</sup> &c. & Row 133. & 134. & 135. & 136. & 137. & 138. & 139.

But such a cov<sup>t</sup> of lease is broken only by a rel<sup>t</sup> of sp<sup>t</sup> on his part. - If then an intent of such a lease is taken on Rel<sup>t</sup> by his Rel<sup>t</sup> the lease is not null for the assign<sup>t</sup> is by operation of law, & not the vice in invitum & Eq. 8a 100. & Vinet 95. & 100. 57. & 101. 488. & 101. 489.

Now is such a cov<sup>t</sup> broken by an act or case of part of the terms - for in legal language it is not an sp<sup>t</sup> as to under lease see that pa. it aue.

Now is such a cov<sup>t</sup> violated by a devise of the terms in lease - for tho' this is voluntary still it is a necessity as it will go to his her. rep<sup>t</sup> if it is not thus disposed of - the lease being unexpired at his death. & Col. R. 766. & 101. 484. & 101. 489.

Indeed I think it wd be safe to lay it down as a gen<sup>l</sup> rule that such a cov<sup>t</sup> is not broken by any assign<sup>t</sup> effected by mere operation of law as by liorn<sup>t</sup>, Lenthwaite, or comm<sup>t</sup>. & the like. for rel<sup>t</sup> & assign<sup>t</sup> only are contemplated

Of Lease. The orig<sup>l</sup> lease continues always liable on his express cov<sup>t</sup> even after assign<sup>t</sup> notwithstanding the liability of sp<sup>t</sup>. You cannot exonerate himself from his express cov<sup>t</sup> by any sp<sup>t</sup> for it does not follow that because sp<sup>t</sup> leaves

Becomes liable, his own liability ceases. - But when he stipulates that rent shall be paid for 20 years or repairs shall be made &c &c. he in all cases becomes an insurer of the payt of the rent &c &c. for the 20 years. 8 B & L 2-3. Poph 126. Doug 443. 4 B & L 96. 100. Salk 199. 1 Foul 358-4. 1 W & L 439.

But, if the lessor has accepted the assignee of lease for his tenant, he cannot afterwards maintain debt for rent agt the original lessee; for debt for rent is founded on the privity of estate & his acceptance of the ass<sup>ee</sup> for his tenant concurs with the act of lessee to determine the privity of estate between himself & lessee Car. J. 334. 380 2 B & L 6. 1 W & L 439. 444.

But when there is an express cov<sup>t</sup> by lessee for the payt of rent he is liable in cov<sup>t</sup> broken for the rent, altho lessor accepts his ass<sup>ee</sup> for his tenant - for here the cov<sup>t</sup> to pay rent being express, the privity of contract remains altho the privity of estate is determined by the accept<sup>ee</sup> of ass<sup>ee</sup> for his tenant Car. J 339. 522. Car. C. 189. 1 Ld 410. 407. 1 Saund 237. P & M 159. 1 Foul 354.

But where there is no express cov<sup>t</sup> lessor can maintain an act agt the origl. lessee for no cause whatever after accept<sup>ee</sup> the ass<sup>ee</sup> of lessee for his tenant for the implied cov<sup>t</sup> are founded on the privity of estate which is now deter<sup>d</sup> by the acceptance of ass<sup>ee</sup> for tenant - I speak of tenants subject to the assign<sup>t</sup> alone, for as to any liability which arises before the assign<sup>t</sup> he



Co. Collet. &c. he of course must remain liable &  
to suit; & cracks above I prefer when speaking of  
ap<sup>te</sup> liability. Co. J. 524. 1. 2d 447. 1. 448. 437. 439 a. 3 Co.  
244. 1. 2d 354. 1. 2d 241 C.

I thought here to be observed  
in the explanation of terms, that L<sup>or</sup> may accept  
a pign<sup>o</sup> of L<sup>or</sup> for his tenant not only by accept<sup>o</sup>  
of rent from him, but by an express agent to  
the assignment, & by any other act which vices  
such an agent. 1. 448. 438. 9

When the cov<sup>t</sup> for  
rent is express, so that L<sup>or</sup> continues liable for it  
after the assign<sup>o</sup>, the L<sup>or</sup> may pursue his reme-  
dy ag<sup>t</sup> the L<sup>or</sup> & also ag<sup>t</sup> the ap<sup>te</sup> at the same  
time, in two several suits, he can however enforce  
but one exec<sup>n</sup> except for the costs - he is entitled  
to costs on both ac<sup>ns</sup> - for he can have but one  
satisfaction, If then after the satisfaction of  
one exec<sup>n</sup>, the other is tried the person taken  
may be discharged by an audita querela upon pay<sup>t</sup>  
or tender of the costs only. Co. J. 523. 1. 2d 447. 448. 449  
a. 6

By the 1st 2d.  
Gen<sup>l</sup> 2<sup>d</sup> wh. is prima facie true in this coun-  
try as C. L., the grantee of L<sup>or</sup> or of the reversion as  
sometimes called, has the same remedy on the cov<sup>t</sup>,  
which runs with the land wh the L<sup>or</sup> has accord<sup>o</sup>,  
to the distinctions above stated - At C. L. it was tho<sup>t</sup>  
he had no such remedy, Thus. if I have made a  
lease for 21 years sell the reversion to J. S. J. S. takes &  
pleas of it the L<sup>or</sup> & has the same power & privilege  
8.

And on the other hand it is provided by the same  
St. that a leasee shall have the same remedy against  
lessee's grantee, that would be the distinction made  
above when he has agt the lessee himself in that  
he had agt lessee at 2 Bl. 1 Ch. 2. 15. 2 W. 4. 522. 3 Bl.  
22. 4 Ba 279.

Of derivative Lessee or Under Tenant.

In 4 Bl. 279.

The liability of a lessee of land. I observed that the  
liabilities attending to him did not extend to  
derivative lessee or under tenant as they are  
sometimes called.

A deriv<sup>e</sup> lessee is one who takes a  
conveyance of a part of an unexpired residue  
of a term; - he is never considered as an assignee  
as A. leases to B. for 20 years, - now<sup>ly</sup> at the expir-  
ation of 10 years B. conveys the whole of the residue  
of the term to C. C. is an assignee but if he lease  
to D. for but 5 years, or any time short of the whole  
then D. is a deriv<sup>e</sup> lessee or under tenant.

Now as a deriv<sup>e</sup> lessee may take the whole  
of the residue of the term & not be considered  
an assignee if he takes it as tenant to lessee & not  
as tenant to lessee. The definition above is not correct.  
or a more proper defin<sup>n</sup> is, That a deriv<sup>e</sup> lessee is one  
who takes a part of the residue of the term, or the  
whole of it as tenant to lessee. 3 W. 4. 524. 2 Bl. 276.

Now as a lessee cannot incidentally such under tenant  
is



Dein<sup>d</sup> Ten<sup>d</sup> is not bound by the cov<sup>d</sup> in the  
orig<sup>d</sup> lease as an aff<sup>d</sup> in<sup>d</sup> be, for between him  
& the lessor there is no privity, none of contract  
for he was not a party to the orig<sup>d</sup> lease, and  
none of estate, for he takes an estate under the  
lessee & not under the lessor. Lessor is his successor  
& Landlord, it avc. & 1 Fentl 177-8. Doug 436.

The rule was formerly holden to be the same  
as to the ~~reversion~~ Mortgage of the whole residue of  
the term, <sup>unless he took poss<sup>n</sup></sup> he was not liable upon the cov<sup>d</sup>  
entered into by the lessee (his mortgagor) because  
it was said he took only as an Incumbrance  
er & not as a purchaser. But this is now  
decided not to be law & also that he is liable  
as a purchaser in the cov<sup>d</sup> whether he takes poss<sup>n</sup>  
or not. Doug 436. 1 Pwll 144. 1 East 506. & the former  
rule in contract 1 Veg. Jr. 285. in diff<sup>d</sup> opinions  
3 Bro. Ch. 186. 1 Veg. 12. 3 Atk 518. 7 ER 306.

Now from  
what has been already said you perceive the  
diff<sup>d</sup> between an assign<sup>t</sup> & a dein<sup>d</sup> & lease is,  
that an assign<sup>t</sup> is a sale of Lessee's interest &  
of his whole interest, a dein<sup>d</sup> & lease is the  
creation of a tenancy under Lessee, The aff<sup>d</sup> & app<sup>n</sup>  
is sent to the orig<sup>d</sup> Lessor & so there is a privity  
of estate whence he is liable on the cov<sup>d</sup>.  
But dein<sup>d</sup> & lease is sent to right Lessee & is lia-  
ble to him alone, & not liable upon the cov<sup>d</sup>  
to Lessor. Ltr 405. 3 Wils 234. 2 Bl. R 468.

The appt. to have property so called is held  
on the covt. <sup>to</sup> ~~from~~ <sup>accord</sup> to the distinction  
above whether the appt. be by act, devise,  
sale under ex. or it be made by any other  
mode of transfer by operation of law: as  
by lease becoming bankrupt, the lease is  
a fact transfer. It makes no diff.  
whether the appt. be by the act of the parties  
or by operation of law. Doug 177.

If a lease <sup>with a right</sup> ~~made~~ a question, of part of the premises  
or subject leased (as distinguished from  
the term) is held for the proportional  
part of the rent, or in other words whether  
the rent can be apportioned, as in ex. cases  
to B for 20 years & B assigns in the land to C.  
In B v. C. 12 Mod. 641. for in the rent. Cro. E. 838.  
1666. Accord<sup>d</sup> to a recent decision is  
seen by analogy that he might be subje-  
cted for the part - for when appt. has been  
evicted of part of the premises, the rent  
may be apportioned accord<sup>d</sup> to what he  
remains in poss<sup>n</sup> of - the analogy is a  
very strict one, as here the transfer is by  
convey<sup>d</sup> only while there is no convey<sup>d</sup>  
as to the case of partial eviction see  
2 East 547.

If a lease covt. for himself and  
his assigns, for as long as he or they shall  
be in poss<sup>n</sup> & then he or his assigns remain in



Senior & Special in Job after the expiration of the term, he is liable on the cov<sup>ts</sup>, tho' after the expiration of the term he is not strictly liable or aff<sup>d</sup>, but being so de facto he is liable for sums on the cov<sup>ts</sup>, for he cannot assume & act as if he was & enjoy the benefit of the case without & avoid it as it is liable & Com. D. 504.

Of Covenants & Bonds to save Harmless

These differ only in form. A cov<sup>t</sup> to save harmless is as I said before it one by which the Cov<sup>t</sup> stipulates to indemnify Cov<sup>ts</sup> ag<sup>t</sup> some loss damage or charge to which the latter may be exposed, as in the case of cov<sup>ts</sup> of indemnity given by the prin<sup>l</sup> debtor to his Surety.

These cov<sup>ts</sup> are not broken by the tortious acts of another, but much resemble the cov<sup>ts</sup> for quiet enjoyment, which cov<sup>ts</sup> only excuse ag<sup>t</sup> all acts hindrances &c. made in a legal manner, & are not broken by the acts of a mere wrong doer, so that the Surety be falsely imprisoned to extract from him the debt the cov<sup>t</sup> to save harmless will not avail him.

Suppose aff<sup>d</sup> cov<sup>ts</sup> to save harmless ag<sup>t</sup> ag<sup>t</sup> of quiet. Now if before afterwards illegally distrains the goods of the aff<sup>d</sup>, it will not subject the aff<sup>d</sup> upon his bond or cov<sup>t</sup>, tho' sums if the distraining was legal 1 Roll 434. 4 Co 20. Bro Car 143. 1 And 219.

On a cov<sup>t</sup> to save harmless the Cov<sup>ts</sup>

Cov<sup>ts</sup> may in some cases maintain an act<sup>n</sup> ag<sup>t</sup> the  
Cov<sup>t</sup> on the ground of his mere liability to a suit, i.e.  
in cons<sup>eq</sup><sup>n</sup> of be<sup>ing</sup> suffering him to become liable to  
a suit, & this is usually the case when the liability  
of the Cov<sup>ts</sup> accrues after the execution of a Cov<sup>t</sup>  
to save harmless. Can. If a ship takes a bond to  
save him harmless ag<sup>t</sup> the escape of a prisoner  
who is admitted to the liberties of a pris<sup>n</sup> gard.  
he may sue the Cov<sup>ts</sup> upon the bond immediately  
upon the escape, altho no suit has been com-  
menced ag<sup>t</sup> him or he has been in no way com-  
municed, his liability to a suit being deemed in con-  
struction a breach of the cov<sup>t</sup>. Cro. E. 83. 123. 1 Most  
510. 5th.

So also if a Surety for a debt to be paid in future  
takes a bond of indemnity from the prin<sup>l</sup> debtor,  
& the debtor fails to discharge the debt on the day  
appointed, Surety may immediately sue on the bond  
on the ground of his own liability to a suit, - & the word  
liability is here emphatic. - his liability is a breach -  
& Baldet. 234. Talk 195. 5 Co. 140. 1 Root 507. 2 B. R. 186.

Overseer.

Now that after the Surety had received on the bond the  
Cov<sup>t</sup> sh<sup>d</sup> come upon the prin<sup>l</sup> debtor, as he may  
do, & he sh<sup>d</sup> pay the debt ag<sup>n</sup>, the Surety never being  
called upon, his remedy in such case must be  
by a bill in Equity, & not. The bill will state the  
two judgments & the Ct will consider the Surety as  
trustee of the money for debtors use. & this will  
place the parties in status quo. 2 B. R. 1045.



~~But see Bond~~ } It is said by some that indelible  
apt will lie. I think not, for no ac<sup>n</sup> at law will lie  
when the object & effect of a security is to  
impeach a former judgment. In case of *Moses & Co.*  
*Forsyth* does not reach this case, the prin of it does  
not apply, indeed it has been questioned as it stands  
in 1802 169, see case. 2 Burr 1095. *Quinn* 2 B. & A. 414, 5. 110 886. 3 B. & A. 131. —

In the other hand, if one  
having obligated himself as surety after his liability  
has attached as ac<sup>n</sup> of ac<sup>n</sup> rests in him until he  
has been actually & specially damaged, as if *A. give B.*  
his surety a cov<sup>t</sup> to save harmless. after the debt became  
due. B. did not sue upon the cov<sup>t</sup> until he was actu-  
ally damaged, *Ex parte* as prin<sup>t</sup>. debtor & surety ex-  
ecute a joint note or single bill payable on  
demand, B. cannot maintain an ac<sup>n</sup> on a cov<sup>t</sup> to save  
harmless which *Dr.* gave him at the time of making  
the note &c. until he has become damaged, were  
it otherwise it w<sup>d</sup> be absurd for then the debtor w<sup>d</sup>  
be immediately liable to a suit on that very cov<sup>t</sup>  
whose very object was to save the surety (B.)  
harmless in future. *Ex parte* 123. 1 Salk 196. a clear  
case w<sup>th</sup> the distinctions — 5 B. & A. 124. 2 B. & A. 284. *Post*  
579.

If a surety having taken no counter security  
is obliged to pay the debt, he may at any time bring  
indeb. aft on the implied engage<sup>t</sup> to pay, But if  
the surety has taken a cov<sup>t</sup> or bond to save harmless  
indeb. aft will not lie for the bond or cov<sup>t</sup> merges  
the implied engagement. & the ac<sup>n</sup> must lie to the

is upon the highest security *Law*, 525. 547 & 548 100.  
100 549. 3 Wils 18. 262. 345.

But when there is no specialty  
or oblig<sup>n</sup> taken by way of indemnity, the remedy of the  
Surety is on the implied promise of indemnity raised  
out of the transaction; but this right of act<sup>n</sup> arises in  
his favour only upon pay<sup>t</sup> of the debt or what is equi-  
valent to it being charged in ex<sup>ce</sup>. 1 Wils 18.

The same remedy  
upon the implied contract exists between co-sureties, for  
contribution when one has paid the whole or more  
than his proportion, Thus if A & B are co-sureties & A  
pays the whole debt, he may maintain ind<sup>em</sup> ag<sup>t</sup> B for a moiety; for it is a rule that when two or  
more are co-sureties, partnership &c. the law raises a  
implied promise on the part of each of them  
to pay his proportion 1 B. & P. 255. 271. Peak C. 438.  
& Day 492. 1 Wils 456.

If however there are more than two  
co-sureties, partnership &c. the only remedy which can sub-  
sist between them must be by a bill in Equity  
we suppose A, B. & C. to be co-sureties & A. pays the  
whole debt, he cannot bring an ac<sup>n</sup> ag<sup>t</sup> B & C. join-  
tly, for they have no joint concern, their oblig<sup>n</sup> is  
several. If their several debt can be precisely ascertained  
then the case could be settled by two suits & so when there  
more parties than two the case w<sup>d</sup> be settled by the a  
number of ac<sup>n</sup>s equal to the number of parties, But  
this is occasion<sup>d</sup> a multitude of suits which the law  
will not allow & indeed a case w<sup>d</sup> seldom occur in



Liabilities { in wh. the amount of each individual debt is ascertained; & where there are several partners, the number of suits in most cases - requisite to settle the case and be imperative for a suit not be necessary? Between any two of the whole number which supposing the number to be so and amount to a multitude, - wh. the law will not allow. The relief in such cases must be by a bill in Equity where the balance will be struck as to the whole by one act? - see a note in B & P. relating to this question an obiter remark of La Plam; see also Boardman vs Seymour. decided in Penn. -

### Release of Covenants.

There are two

rules as to this subject wh. deserve to be mentioned

In the case of covenants in a c. that is obligations in general, a release after assign<sup>t</sup> is in some cases good in others not, i.e. will am<sup>t</sup> to a discharge in some cases in others not,

The gen<sup>l</sup> rule of discrimination is, If the instrument creating the duty is not assignable at law, a release tho after assign<sup>t</sup> will be effectual to discharge it. But when the instrument is assignable or strictly negotiable at law, a release after assign<sup>t</sup> will not in gen<sup>l</sup> discharge it. Thus 1<sup>st</sup> A gives a note which is not negotiable to B. & he assigns it to C. & afterwards releases it to A. the release is effectual.

equival; but the ac<sup>n</sup> on the note must be first in  
the same effect. & the release will be  
the ac<sup>n</sup>.

But on the other hand if I give B a negotiable note &  
he assigns it to C. & afterwards releases it, the release will  
be of no effect; for the note being negotiable C. brings  
the ac<sup>n</sup> in his own name. & the release of B will have  
no effect.

On the same principle if a defor after having  
assigned his adversary's interest, releases to C. & see  
all the costs of the lease, the ap<sup>ee</sup> may still recover  
for the breach of the cov<sup>t</sup> ag<sup>t</sup> the defor & Lev 206. Cro.  
C. 503. 1 Foulk 345.

But when a lease is assigned by defor it  
has determined that he can ass<sup>t</sup> the ap<sup>ee</sup> of all claim  
ag<sup>t</sup> the defor on the cov<sup>t</sup> by releasing them to C. & see  
provided the release be given before the ap<sup>ee</sup> of defor  
has commenced an ac<sup>n</sup> ag<sup>t</sup> defor. & release after he has  
commenced an ac<sup>n</sup> is no bar, because the right of  
recovery has attached in the person of ap<sup>ee</sup> by the  
commencing of the suit. Now I see no reason for the  
first part of this rule; but it appears to be a deep article  
from the gen<sup>l</sup> principle. for I can see no diff<sup>ce</sup> between  
this & the case of the negotiable note negotiated  
the legal title in both cases passes to ap<sup>ee</sup> with the  
possession; - Still the rule is held to be good. & is well est<sup>d</sup>  
attached. Cro E. 561. 503. 2 Roll 411. Esp<sup>r</sup>. 308.

And it is a gen<sup>l</sup>  
rule in relation to cov<sup>t</sup> in gen<sup>l</sup>. That a release by Cov<sup>ee</sup>  
before the cov<sup>t</sup> is broken of all demands, & its ac<sup>n</sup> (which



Release of Capt. Zerkow (in the small "gun" term) does not  
operate as a release, because at the time of making  
the release there was no demand existing, & the  
existing demands alone cover the term. All  
demands refer back to a cov<sup>t</sup> of war and a later  
release all demand as if prior. & afterward is  
expired. - the prior is liable on his cov<sup>t</sup>.

So also explain?

cor. to erect a buildg. for C. on a certain piece  
of land within twelve months, & then within  
one month, B. sh<sup>d</sup>. make all demands ag<sup>t</sup> C.  
The cor. to build w<sup>d</sup> not be released, for there was  
no existing demand.

Whitlock's release in general terms, as "of all demands" will release all <sup>or</sup> at the time actually broken, and if there were several contracts in one and some of which were broken at the time & others not, the release will operate upon the broken & not upon the others. 9 B. & P. 166  
1 Anst 292 b. Bro. G. 99. Allen 30. Salt 171. 2 Ldord 90.

But a measure of all demands, made before the court  
is broken will I trust be effectual as to allow  
court for the future pay<sup>t</sup> of money is the rule  
above does not extend to these courts, because  
such a court creates a solicitation in present, that  
voluntarism in future, the rule wd be the same  
I take it whether the inst<sup>t</sup> be a single bill, bond  
or as well as court, or in fact in any case in w<sup>h</sup>  
the act<sup>n</sup> of debt wd be; In the former cases y<sup>e</sup>

you was no claim at the time that a future liability  
might have accrued

But even in this case of a court,  
to pay money in future & in case of a cov<sup>t</sup> of wa<sup>t</sup>  
or to do some act in specie, a release of all cov<sup>t</sup>s  
before any breach has happened will discharge  
cov<sup>t</sup> i.e. will lay the ac<sup>n</sup> upon them; now between  
a release of this kind & of all demands there is a man-  
ifest diff<sup>y</sup>, for here we release directly discharge the  
cov<sup>t</sup> itself. 2d Reg 515. 2d 57. Cap. 230.

### Findings in Covenant Broken.

I shall not here  
give all the rules applicable to this ac<sup>n</sup> but only  
those exclusively applicable here; for otherwise it wd  
be necessary to go thro almost the whole system of  
Plead<sup>g</sup> under each title

The declaration in an ac<sup>n</sup> of  
cov<sup>t</sup> broken must always state that the cov<sup>t</sup> was  
by deed, this is an indispensable averment, because  
at C.L. a cov<sup>t</sup> i.e. exist only by deed, i.e. by writing under  
seal;

A distinction is to be drawn between <sup>contracts</sup> cov<sup>t</sup>s im-  
der seal & cov<sup>t</sup>s <sup>contracts</sup> without seal, in the former, cov<sup>t</sup>  
broken is the appropriate ac<sup>n</sup> - & case will not  
lie. But as to the latter case in ap<sup>r</sup> is the appropriate  
ac<sup>n</sup> & cov<sup>t</sup> broken will not lie, because cov<sup>t</sup> broken  
lies only on a cov<sup>t</sup> & a cov<sup>t</sup> is only a writing under  
seal. 2d C. 514, 2d C. 118. 209. 2d 314. If then a cov<sup>t</sup> be a writ-  
ing under seal, what means (as above) a cov<sup>t</sup> without seal  
In this ac<sup>n</sup> the de<sup>cl</sup>



Phac<sup>3</sup> & de<sup>1</sup> & setting out the terms of the  
cov<sup>t</sup> must allege a breach - for if there is no  
breach there is no cause of ac<sup>n</sup>, & as this is thus  
misp<sup>3</sup> the ac<sup>n</sup> is denominated Cov. Broken

Proof  
of the rules as to de<sup>1</sup> & in cov<sup>t</sup> look, relate to the  
assign<sup>t</sup> of the breach. 1<sup>st</sup> When the cov<sup>t</sup> is  
gen<sup>t</sup> the assign<sup>t</sup> of the breach may be gen<sup>t</sup>, the  
rule does not hold as to that performance, - Gen  
Epa grantor in a convey<sup>t</sup> cov<sup>t</sup> that he is well  
served, it is suff<sup>t</sup> for Epa<sup>3</sup> to allege by way of  
breach, that "Cov<sup>t</sup> was not well served" making  
use of the words of the cov<sup>t</sup> in ante

Arise when one cov<sup>t</sup> not to buy or sell certain arti-  
cles, within a certain time at a certain place, on  
alleg<sup>n</sup> that Cov<sup>t</sup> had sold at divers times & to divers  
persons within the time specified, (without particu-  
larizing), was holden suff<sup>t</sup> Mol 176, Salk 446, 139  
2<sup>d</sup> Rep 496, EspR, 299.

The breach must always be  
so assigned as to appear upon the face of the  
record to be clearly & unequivocally within the  
cov<sup>t</sup>. Thus when Epa cov<sup>t</sup> with Epor not to cut  
more timber upon the land than was suff<sup>t</sup>  
for repairs, an allegation that he had cut tim-  
ber to the value of £100. was holden to be  
insuff<sup>t</sup> - the proper allegation w<sup>d</sup> have been  
that he had cut more timber than was suff<sup>t</sup>  
for repairs viz to the value of £100. but by the  
alleg<sup>n</sup> there does not appear to be a breach. Cro.  
8.

Of the plf. after assigning a gen. & track narrows or qualifies it by a subsequent words. He is bound down to it as the qualified, & it must confine his proof. In what he cannot recover upon the track receipt or the qualification thus made, Thus when def. says to use the land in a husband like consumer, & the plf. alleges that he had not used it in an husband like manner but had committed waste, he was compelled to prove the waste or not recover for the whole amt. of def. is that def. had committed waste, but if the qualification had not been added, plf. & def. have supported his def. by proof of neglect & in. & c. & def. & plf.

Whenever there is a proviso in a deed separating the cov. in a certain event, plf. need not set out the proviso in def. upon the cov., for it is in the nature of a disclaimer of what def. may avail himself by way of defense. Thus when def. cov. to deliver certain goods to plf. on a certain day, provided he was not prevented by the dangers of the sea, it was decided, that an alleg. by plf. that def. cov. to deliver goods at such a time & place, & that he did not, was suff., & that he need not notice the proviso at all, the omission of it need be no variance. It is upon the face of the instrument, may make use of the proviso by alleg. that he was prevented by the dangers of the sea. The proviso in this case is purely in the nature of a condition of a



Chas. J. a Cond. May 55. Exp. 2001.

But the rule is diff<sup>t</sup>

when there is an exception in the body of the  
cov<sup>t</sup> - when there is such an exception it must be  
set out & negated; the diff<sup>r</sup> then is with lette  
in a proviso annexed to a cov<sup>t</sup>. & an exception  
embodied in it. The first is in the nature of  
a defence for the defence of deft, while  
the second is a part of the cov<sup>t</sup> itself. enter<sup>g</sup>  
into the description of the subject matter  
in it, est. est cov<sup>d</sup>. to convey to B. a good title  
in such a tract of land & excepting the interest  
of J. H. To omit such an except<sup>n</sup> in such a  
when a cov<sup>t</sup> is a variance; - The distinction  
is a very important one as to dul<sup>n</sup> & per cov<sup>t</sup>.  
Exp. 2. 301.

If the cov<sup>t</sup> is in the alternative, to  
do one of two things, the breach must be  
assigned as to both or the dul<sup>n</sup> will be ill. Thus  
when Taper cov<sup>d</sup> not to cut wood without  
the assent or assignment of the L<sup>d</sup> or, an  
assent<sup>t</sup> that Taper cut wood without his as-  
sent was held to be ill, for it is a negative  
pregnant, leaving room for the implication  
that he had made his assign<sup>t</sup> - wh w<sup>d</sup> be a  
complete justification of deft. 1 Leon 256. Exp. 2. 301.

But cov<sup>t</sup> wh literally and in terms are alternative  
are not so always in legal effect - in such case  
the last rule does not apply, Thus when one

one cov't to pay or cause to be paid a sum of m<sup>o</sup> to another. It is suff<sup>t</sup> to aver as a track that deft has not paid owing the cov't or caused to be paid, for causing to be paid is in legal effect paying & as such may be plead. - qui facit per alium facit per se. 1st An 229. Esp 2006. 1.

Q<sup>u</sup> When there is a cov't to pay on the happening of one fact of two contingencies which shall first happen, an averment that one has happened is suff<sup>t</sup> without averring that it is the first, for the de<sup>m</sup> or either implies that the first has happened. Case, & cov't to pay B. 1000 on 4<sup>th</sup> death or marriage of C. wh shall first happen. 2d Ray 134. Esp 2301.

Upon a cov't that an act shall be done by Cov't or his assignee, an ac<sup>n</sup> is b<sup>o</sup> ag<sup>t</sup> the assignee. The track must be laid in the disjunctive viz the act has not been done by Cov't or his assignee, for the ac<sup>n</sup> being b<sup>o</sup> ag<sup>t</sup> aff<sup>r</sup> an av<sup>r</sup> that he has not done does not deny but that Cov't has done it. But if the ac<sup>n</sup> is b<sup>o</sup> ag<sup>t</sup> the Cov't himself it is suff<sup>t</sup> to allege, that he has not done it - for it is presumed there has been no assign<sup>t</sup>. But if has been an assign<sup>t</sup> & a re-assign<sup>t</sup> & the act has been done by assignee, deft may plead it tho' it is not presumed. But when the ac<sup>n</sup> is ag<sup>t</sup> aff<sup>r</sup>, the form of the ac<sup>n</sup> shows that there has been an assign<sup>t</sup>. 1st An 139. 1. 2d An 328. And it is a rule of plead<sup>t</sup> that in answering the pl<sup>ff</sup> is never to admit to show more than a prima facie cause of ac<sup>n</sup>, when any thing



Nothing more required as to negative any dispute  
to his cause of ac<sup>n</sup> or as Labaree says make out  
a good case to every intent in every particular  
it wd. be impossible to frame a debt.

On a do<sup>t</sup>  
to do an act as to convey to a man or his assignee  
an agreement on an ac<sup>n</sup> bro<sup>t</sup> by Gov<sup>t</sup>. That  
debt has not conveyed to himself is suff<sup>t</sup>. with-  
out rec<sup>d</sup>. "nor has been made to his assignee;  
for it is presumed there has been no assign<sup>t</sup>."

But on  
the other hand if the ac<sup>n</sup> is bro<sup>t</sup> by the assignee  
it is necess<sup>y</sup> for him to allege that there has  
been no conveyance made to himself or Gov<sup>t</sup>.  
for now the ap<sup>t</sup> is apparent. 1 Salk 109. 3 Phil 440.  
5 Mod 133.

In covenant for the pay<sup>t</sup> of a sum certain  
there can be no apportionment of demand; the exact  
sum must follow the cov<sup>t</sup> i.e. be for a sum certain  
as the freighter of a ship cov<sup>d</sup> to pay £10 per ton  
I'll allege, a breach upon pay<sup>t</sup> for 10 tons &  
one hoggetts, or say 10 tons & 1/2. & held to be  
ill; for it does not follow the cov<sup>t</sup>, debt does not  
cov<sup>d</sup> to pay for any fraction of a ton, & I'll  
cannot recover upon the debt & yet he recover the  
fractions, wh. was not cov<sup>d</sup> to be paid.

But if the cov<sup>t</sup>  
was to pay at the rate of £10 per ton the allegat<sup>ns</sup>  
w<sup>d</sup>. have been good. 2 Lev 124. cov<sup>d</sup> 19, Exp. 2803; for  
then the cov<sup>t</sup> w<sup>d</sup>. cover the fractions of tons.

Such a decl<sup>n</sup> is ill upon dem<sup>r</sup>  
still if the ~~def~~ after a verdict in his favour for  
the whole amt<sup>t</sup> claimed as £100, he claiming freight  
for 10 tons he may enter a remittitur as to the ex-  
cess & take judgt<sup>t</sup> for the residue. Pray this may be  
done in this & like cases as the precise amt<sup>t</sup> of the  
price & manner of the app<sup>r</sup> upon the ac<sup>t</sup>, this  
then are many cases in w<sup>h</sup> it is not to be done. This  
is the consequence of Plea<sup>d</sup> to issue instead of answer.  
- the decl<sup>n</sup> in <sup>n</sup> is ill upon answer. Salk 635. 1 Post  
66. Exp. R. 303.

Of the Plea<sup>d</sup> in part of the Defendant.

The most usual  
al Plea to an ac<sup>t</sup> of w<sup>h</sup> broken is that of performance

It has hitherto been customary in Comm. & it seems to  
be not altogether unknown in Eng. for def<sup>t</sup> to plead  
that he has not broken his cov<sup>t</sup> which is int<sup>r</sup>duced  
as a Plea of performance. It cannot however in my  
judgt<sup>t</sup> be good in any case whatever, for it refers  
to the jury every quest<sup>n</sup> of law w<sup>h</sup> arises out of the  
Plea of perform<sup>t</sup> & does not form a suff<sup>t</sup> issue, as ~~if~~  
may reply he has broken his cov<sup>t</sup> which forms the issue  
but upon no particular fact. The rule has never  
been sanctioned by any decision in Comm. & that  
it is an singular & inadmiss<sup>l</sup> way of Plea<sup>d</sup>. Per-  
formance see 2 Vent. 156. 2 Mod 33. 2 M. & B. 1312.

Now without any familiar acquaintance with  
the rules of Plea<sup>d</sup> the common sense of mankind  
will determine that such a Plea must be bad;  
for



~~Should I~~ { for, what is meant by the plea can-  
not be learnt from the rec<sup>d</sup> as the special facts  
upon which defence for defence do not ap-  
pear, which <sup>is</sup> the case.

but it seems to have been questioned by Bousie  
whether a plea of ~~est~~ has not taken his cov<sup>t</sup>  
is not good to a ~~act~~ that he has not taken  
his cov<sup>t</sup> the argument is that this directly neg-  
atives the ~~act~~ & forms the issue. But for my  
own part I do not think this as bad as the other, for  
the argument is not ~~if~~ being a mere  
conclusion of law from the specific facts alleged  
250 270 280. 2 Ed. R. 12/2.

It is laid down as a rule that  
when the cov<sup>t</sup> in a ~~act~~ are affirmative it is  
compulsory for ~~defendant~~ "plead perform" generally  
as he has taken & performed all the cov<sup>t</sup> & so  
10 Nat 803 & Exp. 2. 815. 4 Ba 91.

This rule however must certainly  
relate to cases in which the acts or things to be done are  
in some measure indefinite & multiparious, &  
consequently to those cases alone; as in case of a cov<sup>t</sup>  
by a ~~sheriff~~ to return all writs to him directed, or of  
a cov<sup>t</sup> by a deputy ~~sheriff~~ that he will discharge all  
the duties of his office, In then cases such ~~general~~  
Plea<sup>t</sup> is only allowed 605. 4 Ba 91.

But when  
on the contra ~~defendant~~ has cov<sup>t</sup> & perform a number  
of specific acts, he must ~~avow~~ the performance  
of each by ~~plea~~ it specially, as if a cov<sup>t</sup> to ~~keep off~~  
Jed

As on a particular day of several tracts of land, it will  
not be suff. for one to plead gen. that "I have per-  
formed all the covts." but I must plead that I  
have enfeoffed him of such & such & such pieces  
of land & then on all that new covt. to be enfeoffed.

As so in case of a covt. by an Exec. to pay all the  
legacies in a will, it is not suff. to say he has paid  
all the covts. & has paid all the legacies, but he must  
say he has paid next a legacy to A. & must name B. &  
on &c. & then on all the legacies to be paid; The gen.  
plea will not answer, the truth is the rule allow<sup>d</sup>  
a gen. plea of performance is but an exception  
to this rule. Cow. 549. 1 Saund. 117. Bro. 359.  
360. 1 Lev. 333. Fulk. 198. 1 Lid. 215. 1 ER. 152.

This Inquest  
is the gen. rule, & the other is an exception made  
because the rule allowing gen. plead<sup>s</sup> is permitted  
only for the purpose of avoiding prolixity upon  
the record & as L<sup>d</sup>. Coke & says it is based in im-  
possibility, as in the case of a deputy sh<sup>er</sup>ff having covt.  
to perform all the duties of his office, now at 80 an 80  
he has to quit him, on that covt. after a number of years  
have elapsed, & he is required to plead all his several  
acts of duty & finally, it is a & requiring the perform<sup>t</sup>  
of an impossibility. It also in case of the brewer  
who covt. to deliver to sh<sup>er</sup>ff all the grains which were  
used in his brewery, an 80 on the covt. long bro<sup>t</sup>  
ag<sup>t</sup> him after a no. of years he was allowed to plead  
gen. Cow 549. 1 ER. 152. <sup>rule</sup> finally laid down — Bro. 359.  
916. 1 ER. 643. Cap. D. 315.



*Please of debt*  
and a plea of *performance* & whether  
gu<sup>t</sup> or actual otherwise than in the words of the  
cov<sup>t</sup> that is not compatible with the words of the cov<sup>t</sup>  
is ill upon gen<sup>t</sup> dem<sup>r</sup>. For if the plea does not  
conform in this manner it discloses no sufficient  
defence. 1064 & 455. e.g. cov<sup>t</sup> ac<sup>t</sup> is cov<sup>t</sup> ag<sup>t</sup> an Exec<sup>r</sup> on  
a cov<sup>t</sup> by him to pay all the legacies given in the  
will of his testator, a plea that he paid such a  
leg<sup>y</sup> &c. & such to B &c. is ill on gen<sup>t</sup> dem<sup>r</sup>  
for want of the clause "there was" for tho<sup>o</sup> he  
may have paid all, still whether there were or  
not given in the will does not appear by the  
record, the latter clause should be added & then the  
plea will follow the words of the record.

Since per

of affirmative cov<sup>t</sup>.

When on the other hand some of  
the cov<sup>t</sup> are negative & some are affirm<sup>e</sup> & def<sup>r</sup>  
cannot plead *performance*. Usually as to the negative  
where they are all negative he cannot plead  
usually to all. But when some are neg<sup>t</sup> & some  
an affirm<sup>e</sup> he must plead as to the neg<sup>t</sup> that  
he has not done the act cov<sup>d</sup> ag<sup>t</sup> & *performance*  
as to the other accord<sup>g</sup> to the rule above, for  
it is considered as a solacism to say he has per-  
formed a negative cov<sup>t</sup>. But such a plea is  
ill only on special dem<sup>r</sup> as it is good in  
point of substance it evidently meaning that  
he had kept his cov<sup>t</sup>. Bro C 203. 591. 1 Inst 303. C. Bro  
536. Com. D. 256. C 256. Esp. 305.

If the execution of several covenants in a deed some are affirmative & some are negative & the negative are void, after plea of performance without notice of the negative covenants will be good, as a duty to perform among several lawful things which he was to perform, not to execute a certain legal process. In an action upon these covenants a plea of performance of the affirmative covenants keeping the illegal covenants in silence will be good. 1 Saund 23, 11705. Moore 256, Prob. 13.

When one covenants in the disjunctive he must shew which of the two acts or things he has performed, as if a covenant either to convey a tract of land or pay so much money to the use of within a given time he must shew which. 1 Anst 2036. Cro J 659. 8 Co. 133. 1 Saund 117.

And it is said that if he pleads that he has performed, without shewing which he has performed, the plea is ill on grounds of demurrer; but this seems to me to be wrong; & that it should be ill upon special demurrer alone, for the substance of the plea is good; inasmuch as it shews that he has performed one of the alternatives the defect lying in the form alone. But the rule is well established as see Cro J. 239. Com. D. 207. 225. 6. 1 Lev 311. - my opinion supported 4 Ba 91. But Bacon is not a good authority.

When one covenants to do some act which consists as it is termed of matter of law, as to make a conveyance or execute a discharge, the party must plead not only performance but the good mode, i.e. not only that he made the conveyance but the



And ~~the~~ <sup>the</sup> manner in which it was made - it may appear to the Ct to have been made in a legal manner, for that the conveyance is legal is apart from the work of this is a question of law for the decision of the Ct. it therefore must appear upon the record. 124. 9825, 9826, 9827, 104.

Upon the same point if one covt. be as an act, it must appear as of record as to pay a fine or suffer a recovery, perform & the quantum must be pleas. 104. 560. 1 Inst. 3036.

With respect to covt. or bonds of indemnity there are some cases of pleading on the part of deft who affdly, exclusively, rely on such bonds.

Upon such covt. deft may sometimes plead generally by way of perform & non damnificatus. In other cases this mode of pleading is not sufft but he must plead that he has discharged or paid &c. &c. i.e. he must plead the particular mode & act by which the plff has been indemnified.

The first genl rule is this, If the covt. is to discharge or acquit the covt. of any particular thing, or obligation ascertained in the instt. or covt. as of such a bond, non damnif. is not a sufft plea, but in this case deft shd. plead in the terms of the covt. that he has discharged or acquitted the covt. of the obligation ascertained in

in the debt by payment of it so. Bart 374 & 384  
Cro E 433. 4 Bac 92. 1 Saunders 1170. 1 MS & R 639

The reason is that def. is bound to do a certain  
affirmative specific act - he therefore must plead  
performance by the plaintiff. And as it is matter  
of law, he must also plead the just matter.

But on the other hand, if the court is given to in-  
dennify or save harmless the plaintiff of such a duty  
obligation or duty non damnum is a good plea  
for here no specific act is required to be done, but  
only to bring about a certain result. & this may  
be done in a variety of ways. & in any way that  
the deft. pleases, as by paying or cancelling the  
bond &c. & if the object of the court be just accom-  
plished the manner of doing it does not concern  
the plaintiff. 1 Saunders 1170. Cro E 433-4. 2 Cro 4. 1 Lew 174. 2.  
Wils 125. 5 B.R. 309, 310.

But whether the court is given  
as to save harmless or particular, to discharge or  
acquitt plaintiff of any thing not ascertained by the deed  
as all damages costs & charges or may accrue  
in such a suit, non damnum is a good plea  
in both cases. The distinction arises from the  
circumstance of the thing not being ascertained  
in such cases. Cro. E. 915. Bart 374. 3 Ind 252. 1 Bac  
& Pul. 839m. 5 Mod 224. The reason is that as  
the damages, costs or of the suit are not ascer-  
tained, the court to acquit or discharge, is in effect  
a general court to indemnify or save harmless.



*Plaintiff's Plea* { Because more constant the  
thing can't agt. has ever occurred. Now here  
note a plain diversity between this and the  
former case of a cot. to acquit or else charge. If  
I am to acquit you of a bond ascertained  
in the debt it is clear I am to acquit you  
of a certain existing claim, but when I  
am to acquit you of damages of a suit  
it does not appear from the instr. that  
such damages have ever accrued and I  
cannot acquit you of what does not  
exist. I cannot plead performance specially for you  
were I obliged to do it I sh. be outwitted by the  
rules of plead. as nothing has a need of wh.  
I sh. acquit you. therefore non damnum  
is a good plea. Its effect nothing more you  
than pleading that ~~nothing~~ damage has ac-  
crued. of wh. I was to save plff. harm. If  
then in fact any such damage has been  
suffered you may avail yourself of it by  
a replication. Saund 117m. Barth 375. But see  
363.4. & Wils 126.

When non damnum is a good  
plea if def. will plead affirmatively as that  
he has acquitted &c. he must plead it specially  
i.e. point out the act by wh. he has done it.  
Because his affirm. & allegation implies that  
he has done some specific act. & he must then  
show what it is. Since then he will say he  
has acquitted or saved plff. harm. he must say  
more

now the plaintiff has said *Exp. & Post. 5. Cur. 4. 362. 634.*  
*Cur. 4. 918.*

However if defendant is in the affirmative, as he has said, *Exp. & Post. 5. Cur. 4. 362. 634.*  
more it is ill only on special demurrer, because  
the plea is ill only in form the substance is  
suff. *1 Lev. 194. 1 Saund. 117n.*

Non damnification  
is not a good plea than as on a bond or deed  
to pay money on a day certain, this is appear-  
ing a condition in the deed on by way of assise.  
that it was given as a gift & indemnity, for  
the obligation to be performed is a specific  
act. *1 Br. 368.*

If defendant pleads non damnification, when  
the plea is proper, a replication consisting of a  
general traverse, or a general allegation that plaintiff has  
been damnified is ill; for when it is proper for  
defendant to plead non damnification it is enough for plaintiff  
to show a special breach, then as he undertakes  
to show a breach it is enough for him to show in  
what it consists as that he has paid the money  
or been taken in execution. *1 Lev. 93. 1 Sid. 144.*  
*4 Bac. 92.*

*Of joint and several Covenants.*

If any  
number of persons covenant jointly & only jointly, they  
must all be joined as defendants in a suit upon the  
covenant. If two persons covenant jointly & severally, they  
may join as defendants in the same suit, or may be



the ~~two~~ <sup>two</sup> Cov<sup>ts</sup> } be sued separately, because they  
have an ~~several~~ <sup>several</sup> as well as (separately) jointly.  
& both may be sued in different ac<sup>ns</sup> at the same  
time. But if three or more can't jointly & severally  
they may be all sued jointly or each severally  
but two of them cannot be joined without  
joining all the rest. because the cov<sup>t</sup> must  
be treated as altogether joint or altogether  
several; but if two are sued without the third  
it is treated as joint as to the two & as several  
as to the other. - This is the gen<sup>l</sup> rule of dis-  
tinction applying to all joint & joint & several  
contracts whatever whether cov<sup>ts</sup> oblig<sup>ns</sup> promise  
&c. &c. 12 Co 26, 1 Sid 238, 2 Vern 99, 3 Salk 363, 3 Bac 697.  
3 BR 732.

If there are two or more joint cov<sup>ts</sup> oblig<sup>ns</sup>  
they all must join in the ac<sup>ns</sup> Cov<sup>t</sup> upon the  
instrument because the claim is joint, & if the claim  
is to be divided by the Cov<sup>t</sup> in to fractions assigning  
each cov<sup>t</sup> his share, the Cov<sup>t</sup> wd be liable to as  
many suits as there are Cov<sup>ts</sup> 2 BR 282.

And if  
in such case, one of two or more cov<sup>ts</sup> dies alone  
yet may either plead the nonjoinder of the  
others in abatement, or upon oyer & recital  
of the cov<sup>t</sup> demur. 2 Stra 1145, 5 Co 186.

If one  
of two joint Cov<sup>ts</sup> dies, his Ex<sup>or</sup> or personal rep-  
resentative cannot sue upon the cov<sup>t</sup> or join  
with the survivor in a suit upon it, the entire  
right

right survivor to the survivor, but the survivor is  
subject to account with the Gov<sup>t</sup> &c. This rule ap-  
plies to ac<sup>ts</sup> on promissory of all kinds. See Eysd. 1 East.  
447. 1 B & P. 445.

In some cases where one cov<sup>t</sup> with two  
or more jointly & severally, one may sue alone, & in  
others all must join. On this subject the rule is  
that if the interest of the cov<sup>t</sup> appears to be sev<sup>l</sup>  
they may sue separately but if the interest is  
joint they must sue jointly. Thus if a man  
by one & the same deed to lease Barn to A. and  
Wagon to B. & cov<sup>t</sup> that he is well sized of the whole  
each of the cov<sup>ts</sup> A & B. may sue alone on the cov<sup>t</sup>  
of ruin, because it appears in this instance  
that the interest of A is separate from that of  
B. so that any defect of title in the Gov<sup>t</sup> as to  
the wagon will not at all affect A. &c. 5 Co.  
8. 18. 19. 2 Leon 44. 3 Lev. 160. 2 M. D. 157.

So also on a cov<sup>t</sup> to pay \$100 to A & B to be equally divided  
between them each may maintain a separate ac<sup>ts</sup> for  
his \$50. without naming the other, for such is the legal  
effect of the cov<sup>t</sup> the words of severally rendering it the  
same in effect as two distinct cov<sup>ts</sup> for \$50 each.  
One cov<sup>t</sup> may in his ac<sup>ts</sup> declare upon the cov<sup>ts</sup>  
accord<sup>g</sup> to the form of the instrument out; as for a cov<sup>t</sup>  
to A & B to pay 100 \$ &c. to be equally divided between them  
See Eysd. 1 East. 46. 919. Cow 432.

But tho' the cov<sup>t</sup> be both in  
one deed & supposed to be joint as well as several; still



Joint & Joint & Several? Joint if the interest of the cov<sup>ts</sup> appears to be joint they must all join in the a.c.<sup>ts</sup>, as if it cov<sup>ts</sup> with A & B. to pay them \$100 & each & either of them; & without using the words "to be equally divided between them" they must sue together for in judgt. of law they both take jointly. The rule then is that if one binds himself by a cov<sup>t</sup> in a deed to two or more cov<sup>ts</sup> jointly & severally. If their interest is joint they must sue jointly notwithstanding the words of severality. This is the rule as to cov<sup>ts</sup> but not as to cov<sup>ts</sup> 5 Co 18, 19, Junk. 262. 1 Bac 532. 1 East 497.

From the rules already laid down it follows as a corollary, that the co-obligors or cov<sup>ts</sup> may bind themselves severally for the same thing, as obligors or cov<sup>ts</sup> cannot have several rights of a.c.<sup>ts</sup> for the same cause. Thus if A & B bind themselves jointly & severally to pay \$100. They may be sued jointly or severally, but if A. cov<sup>ts</sup> with A & B jointly & severally - as that he is well sued, A. cannot be sued by both of them in separate a.c.<sup>ts</sup> because a person ought not & cannot be sued in two several a.c.<sup>ts</sup> for the same cause 5 Co 19a.

If two or more cov<sup>ts</sup> jointly & severally, each may be sued <sup>severally</sup> for the negligence or default of the other, for each is an insurer for the performance on the part of the other as well as on his own. Thus if two B<sup>rs</sup> A & B bind themselves jointly & severally

to pay all the legacies mentioned in a will &  
and receive the whole appts & sh<sup>d</sup> pay nothing  
B may be sued alone that he receive nothing &  
is not at all in fault.

So also if A & B sh<sup>d</sup> bind themselves jointly and  
severally that A sh<sup>d</sup> as a certain act. B will  
be liable alone for the default. 13th 553.

and in  
those cases where one of two persons jointly  
A & B bound is sued alone & judgt<sup>h</sup> is made  
agt<sup>h</sup> him, the recovery is not bar to an act agt<sup>h</sup>  
the other, for both continue liable until the  
whole cov<sup>t</sup> is performed; And as the taking  
of a commissioning one on Dec<sup>n</sup> is no bar, neither  
is any act whatever which is not in satisfac-  
tion of the cov<sup>t</sup> 5 Co 36. 5 Co 46. East 143 4.  
3 East 251. Chit B 124. 182.

If one of two joint oblig<sup>es</sup>  
he dies the other surviving, the right of ac<sup>n</sup> sur-  
vives to the survivor. So too if one of two joint  
obligors or Cov<sup>ts</sup> dies the other surviving, the  
liability survives to the survivor. The representa-  
tive of the deceased is not at all liable, for  
as before he had no right here he has no  
liability, the representative is liable for  
his proportion of cov<sup>t</sup> in case of a failure.  
The survivor is obliged to pay the whole --

On the other hand the Cov<sup>t</sup> is joint & several  
on the part of those bound by it, & one dies



*Joint & sev. Covts* does the other surviving, the representatives of the deceased are liable at law, but not jointly with the survivors - not as upon a joint covt but only separately as upon a several one & this may be done because a j<sup>t</sup> & sev<sup>l</sup> covt is precisely like two separate covts 1 East 404.

Of two persons covt jointly or severally the word "or" in the exposition is construed as "and." It is not construed literally; it would empower the debt to be paid by any of them. It is not to be construed as "or" of them. 1 Stra 76. Cow 332. Mica B 135-6.

If one of two joint & sev<sup>l</sup> covts is made Q<sup>r</sup> to the Cov<sup>ee</sup> the obligation is at law released as in toto as to both, for one of the debtors by virtue of his representative character has now become creditor also, & he cannot sue himself & the law will not allow him to sue his co-party & Co 136. Talk 300. 1 Inst 164 B. 3. Bac 689.

In this case however a Ct of Equity will compel a payt. in favour of creditors & legatees of the deceased but no father, & not in favour of mere pers<sup>l</sup> rep<sup>g</sup> claiming under the act of distributions. - But this payt. is compelled only when the debts & legacies cannot be paid without it. 3 Ballot 240. Yelw 150. 8 W 83 p. 2 Pow. 825 p. 8 & Mica 82. the reason is that a man must be just before he is generous. Why the covt cannot be enforced in favour of personal rep<sup>g</sup> is

is, & in the appointment of the debtor to be his  
creditor is in legal effect a legacy to the amount of  
his debt, or rather is a negative legacy it being  
the forgiving the debt. Now a legacy must be  
bequeathed to a creditor, & he is preferred to the  
representatives, and the legacy in this case is  
implied it is postponed to the other debts. This  
I take to be the true reason.

If an instrument begins  
thus "We A & B covt &c" & is signed by A alone, he  
may be sued alone upon it as upon his sole debt  
because in legal effect it is such, for he alone  
executes it, & as he executes it, it is his debt. &  
altho there is an incongruity between the opera-  
tive words & the signature still it is good. 1 Bur  
323. 2. P.R. 32.

So if an instrument recites that "We  
A & B, covt &c on the one part" & B does not execute  
it A & B may be sued alone avowing that B did  
not execute the instrument, But I can see no  
reason why ~~this~~ averment sh<sup>d</sup> be made, for it is  
discoverable from the face of the instrument  
that B did not execute it 2 Ltho 1146. 1 Bur 323. 2. P.R.  
47.

If two or more persons bind themselves together  
by one promise or contract the obligation is of  
course joint, tho the word "jointly" is not used, - un-  
less then in some word of averalty used, as in case  
of a prom<sup>t</sup> note. We A & B promise to pay £100.  
&c. It is a joint note & with 21. 2<sup>d</sup> May 1611. 1 Ltho 236. 3 Bur  
597.

































































Account not for or ag<sup>t</sup> their representations, being  
founded on such privacy, ~~that~~ <sup>as</sup> the representative  
has not. 1 Com. 2, art. 2. 2. 1 Inst 69, 90. 2 id 404. F.M.B. 117.  
1 Bac 17, 1 Com. 88. - There is an exception as to L in  
favour of R<sup>s</sup> of j<sup>ts</sup> merch<sup>ts</sup>, not, ag<sup>t</sup> them. 40 L<sup>ts</sup>  
90. 2 Com art. 2. 2 Inst 404. - & this by the L.M.

It must be  
11. 12 Cal. 1<sup>st</sup> & 25 Cal. 3<sup>rd</sup> & 31 Cal. 3<sup>rd</sup> (wh are ancient Stat<sup>s</sup>)  
extended the act<sup>n</sup> gov<sup>t</sup> to R<sup>s</sup> in case of R<sup>s</sup> & Rec<sup>rs</sup>  
& Rec<sup>rs</sup> the R<sup>s</sup> of R<sup>s</sup> & to adm<sup>rs</sup> 1 Bac 17, 20 L<sup>ts</sup> 39. 2

The L<sup>ts</sup> 4 Com. extended it ag<sup>t</sup> R<sup>s</sup> adm<sup>rs</sup> of Guardians  
R<sup>s</sup> & Rec<sup>rs</sup> & also ag<sup>t</sup> the R<sup>s</sup> & adm<sup>rs</sup> of them  
in common, & j<sup>ts</sup> ten<sup>ts</sup> as well as to the j<sup>ts</sup> ten<sup>ts</sup> & their  
selves. 1 Bac 17, 3 Bl 154. So that it now lies gov<sup>t</sup> for  
say<sup>g</sup> the pers<sup>ns</sup> & up<sup>ts</sup> of the orig<sup>l</sup> parties.

The act<sup>n</sup> is exten-  
ded by L<sup>ts</sup> 6 j<sup>ts</sup> ten<sup>ts</sup> ten<sup>ts</sup> in com<sup>on</sup> Coparceners. Min<sup>ors</sup>  
R<sup>s</sup> & adm<sup>rs</sup> ag<sup>t</sup> their Co-tenants. L<sup>ts</sup> 6 R<sup>s</sup> & - also  
in favour of R<sup>s</sup> who are residuary legatees, ag<sup>t</sup>  
their Co-R<sup>s</sup> - Co residuary legatees in general  
ag<sup>t</sup> R<sup>s</sup>. Does it lie in Com<sup>on</sup> ag<sup>t</sup> R<sup>s</sup> of  
R<sup>s</sup> & Rec<sup>rs</sup> & Rec<sup>rs</sup> & Rec<sup>rs</sup>. It does by usage as to the R<sup>s</sup>  
of those whose R<sup>s</sup> have not accounted. 1 Roll 116.

In every case except of Guard<sup>ians</sup> the debt is charged on  
R<sup>s</sup> or Rec<sup>rs</sup> or both. Com 2, art. 2. 2. 1 Inst 69, 90. F.M.B. 116.

The diff<sup>erence</sup> between a R<sup>s</sup> & Rec<sup>rs</sup> is, - a R<sup>s</sup> is one  
agent who has received the prop<sup>ty</sup> (of any kind) of



of another & improve for the owner & acc<sup>t</sup>, & who is entitled to an allowance or wages for his reasonable expenses & charges. 1 Inst. 172 a.

He must account for profits he has made & for those he might have made with reasonable industry. 1 Inst 172 a. Com. 100 t. a 3. 1 Bac 19. 1 Elw 2n.

A Receiver is one who has received money for the use of another, & under an acc<sup>t</sup> & who has no allowance for his trouble. 1 Inst 172 a. 1 Roll 119. Com D. 100 t. a 4. That acc<sup>t</sup> lies ag<sup>t</sup> one who is appointed to receive the money of another name or debt of another (ind. party) - & receives money due on bond to B. -

For a Receiver has no allowance & is not bound to account for profits (c) 1 Bac 19. 21. 1 Com. 93. 1 Com. D. 100 t. a 10. B. Therefore Niff cannot be charged as Receiver - further he wd lose his allowance 10 Lit 172 a. Wall, ab. 119. 1 Bac 19.

This act<sup>n</sup> being founded on privity lies not in case of tort. 1 Com. 100 t. D. & ext<sup>d</sup> in favour of the king in Eng<sup>d</sup>. 1 Inst 172 a. 90 b. 1 Ro 34 a. 1 & of Niphus 1 Vern 435. 2 ib 295. 34 b. 1 Atk 489. 1 Com. 100 t. a 10. 119. 1 Com. D. 229. 1 Inst 89.

If there <sup>there or</sup> are more partners in trade, a acc<sup>t</sup> does not lie at law to adjust their acc<sup>t</sup>; the remedy must be in Eq<sup>y</sup> to prevent multiplicity of suits. Baronian is Seymour. 13 Et. 1. 1208 2 Bac 268. 2 Bay 119.

An acc<sup>t</sup> ag<sup>t</sup> a partner as Niff or Receiver states that he delivered property to a

for profits & charges, & is entitled to an allowance, & is not bound to account for profits & charges (c) But one of them or more

Account as b<sup>ff</sup>, & that deft. refuses to render his reasonable  
acct. w<sup>th</sup> he claims together with his damages & costs.  
In case of Partnership & I suppose of j<sup>st</sup> ten<sup>ts</sup> &c. p<sup>ff</sup> states  
that deft. has received more than his part &c.

It is said  
that an acct. lies not for a sum certain, as if one  
delivers \$100 to A. to trade with; the former shall not  
have acct. for \$100. but for the profits - In ch<sup>g</sup>, all  
w<sup>d</sup> be settled at once - Should not the rule be that  
for a sum certain one sh<sup>d</sup>. not be charged in acct.  
as b<sup>ff</sup>.? / Com. acc<sup>t</sup> & 3. / - For acct. lies ag<sup>st</sup> a sh<sup>ff</sup>  
for a sum certain received on ex<sup>ch</sup>. / 100. 200. / So for  
money received by A. on bond for B. - So when one  
receives money for the use of another to render an  
acct., an acct. of acct. it seems will lie for the money  
rec<sup>d</sup>. / Inst. 1720. 1 Bac 201. 2 Strad 101. 1 Com. ex<sup>ch</sup> & 4. 5 T. R.  
115. 1 Roll 14. 22. 115. + So if money is delivered to be  
returned on a certain event / 1 Com. ex<sup>ch</sup> & 4. 5 T. R. 115  
1 Roll 115. 10. 42. 22. / Decided by J. C. Com. that acct.  
will lie for a sum certain paid 103. + If money has  
been received by A. to the use of B. acct. lies by B.  
& here the p<sup>ff</sup> must declare of whom the money  
was rec<sup>d</sup>. / Inst 1720 1 Roll 120. 5 T. R. 115. 1 Com. ex<sup>ch</sup>  
& 4. / Still if I deliver money to A. to deliver to B.  
for my use & A. delivers it, I can't have acct. ag<sup>st</sup> B.  
- for he is not privy to the use. 1 Com. ex<sup>ch</sup> & 4. 1 Roll  
115.

If Bailee of goods wastes or refuse to deliver them acct.  
will not lie, but trover or detinue will. / 1 Com. & 101  
D. 101. 19. 1 Roll 115. / for he has not rec<sup>d</sup>. them to improve  
on



in acc<sup>t</sup>. So it lies not ag<sup>t</sup> discussor for the profit  
case of thing. A profit or capital account. But what  
lies with here is in the nature of acc<sup>t</sup>. 1 Com. 24.  
R. 3 Leon 24.

If an off<sup>r</sup> makes a debt & cannot have  
acc<sup>t</sup> ag<sup>t</sup> him, for want of privacy. But the off<sup>r</sup> may  
1 Com. 24. R. 1 Roll 118. 20. R. 2. B. 114.

The off<sup>r</sup> may be sued  
& liable for torts, yet if made off<sup>r</sup>. they are not  
liable to acc<sup>t</sup> for they cannot contract & are supposed  
incapable of accounting. 1 Com. 24. 1 Bac 17. 1 Roll 114.  
R. 2. B. 118. 1 Inst 172 a.

If he who receives property of another  
to acc<sup>t</sup>, makes an express promise to acc<sup>t</sup>,—this acc<sup>t</sup>  
or a special ass<sup>t</sup> on the promise will lie. 1 Bac 21. 1  
Lew 9. Earth 88. 1 Salk 4. Kirk 164. 354. Comb 49. 2 S. 964  
11. Comb 49. 1 Inst in assumps<sup>t</sup>. 1 S. 2. 1 S. 2. 1 S. 2. 1 S. 2.  
shall not travel into the particulars of the acc<sup>t</sup>  
but confine himself to the damages he has sustained  
by acc<sup>t</sup> not accounting. 2 S. 97. Salk 9. Earth 88. Comb  
49. R. 2. B. 145. 1 An 1 Bac 49.

If one by and acknowledge  
that he has no money to acc<sup>t</sup>, the off<sup>r</sup> has his election  
to bring acc<sup>t</sup> or on the ass<sup>t</sup>. 1 Bac 21. 1 Roll 118.

If one  
finds the profit of another acc<sup>t</sup> lies not ag<sup>t</sup> him  
for acc<sup>t</sup> is founded in privacy. Com. R. acc<sup>t</sup> to D. B. 7

## Mode of Proceeding

In an act<sup>n</sup> of acct<sup>n</sup> if the plff prevails there are two judg<sup>t</sup>s - The first is quod competet. Decisions are then appointed before whom the accounting is had. 1 Wils 99. 1 Bac 21. 1 Mils 216. 1 Com. 92. 1 Com. acct<sup>n</sup> 615.

The auditors then make their award & final judg<sup>t</sup> - and whenever it is rendered upon it, as upon a verdict (past). 3 Mils 154. 1 Selw 9. 7. 11 Co 41a. - Com. acct<sup>n</sup> 615.

Before auditors in Com. the parties are of com<sup>n</sup> right entitled to testify - They may also be required to swear, & on refusal may be imprisoned by J<sup>c</sup> and J<sup>r</sup>, until they answer. 11 Com. 24.

If defendant refuses to attend before aud<sup>r</sup> or produce his account, the aud<sup>r</sup> must award the plff his whole demand. (past). (11 Co 24.) In Eng<sup>l</sup> the Ct do it. Com. acct<sup>n</sup> 615. Cro. E. 806. 3 Mils 114.

If aud<sup>r</sup> find a balance in favour of deft in Com. they may award & judg<sup>t</sup> goes for him to recover damages as well as costs. 2 Chrift 150. & 100 s<sup>c</sup> in Eng<sup>l</sup> acct<sup>n</sup> in 11 Co 100. 15.

As to what deft may plead in bar, there has been much dispute 3 Wils 113. It is competent for deft to plead in bar any thing wh shows that he is not bound to acct<sup>n</sup> - It is a good plea therefore that he never was off 1 Com. acct<sup>n</sup> 24. 1 Bac 20. 1 Roll 121. This in the gen<sup>l</sup> issue So a release of all acct<sup>n</sup> is a good plea in bar. 1 Roll 123. 4. Bac. 25. 1 Bac. 20. So an award of arbitrators that deft.





Account. <sup>Sec 21</sup> } He pleads in bar to the act<sup>n</sup> must be  
so pleaded & not before aud<sup>n</sup> / Leon 219. 1 Bac 21. 1 Com  
93. 3 Wils 93. 101. 13. Cro E 88. 115. 4 this is to avoid trouble  
& charge to the parties Stat 411. 3 Wils 113. Com aut 60

And nothing can be pleaded before aud<sup>n</sup> contrary  
to what has been pleaded in Ct. & found a 13 Wils 114. 1  
nothing wh. infringes the judge's "good computation."  
Thus the pleas - never bluff - release - fully accounted  
- & award in discharge - are not good before the aud<sup>n</sup>  
Cro E 88. 3 Wils 113. 2 Bay 115. - for they are contradictory  
to the judge's good computation - as they deny debt liability  
to account.

But it is a good discharge for debt. of a suit  
is sometimes & properly a good accounting, before the  
aud<sup>n</sup> to show any thing wh. is not to be read in bar, to  
the act<sup>n</sup>. But wh. discovers that he ought not to be  
eventually liable, E.g. That the prop<sup>r</sup> was lost at an  
east coast - came from necessity. 1 Hall 124. 1 Bac 21. 1 Com  
89. - Taken by robbers without debt fault, or by the  
enemy. 1 Com 91. Stra 580. Com 2. Dec<sup>r</sup>. E. 11. 12. 4 to show  
it ane. He was not the plea that the goods were taken  
by an enemy in Stra 580. a plea in bar to the act<sup>n</sup>. 2. 1  
Com 91.

That the property was perishable & in danger of being  
lost & therefore he sold it on credit is not good ac-  
counting - for he had no right even in this case to sell  
on credit without a special commission to that effect  
1 Bac 21. 2 Mod 100.

Left in accounting is allowed a 20



all losses occasioned by inevitable accident, - as  
enemies, robbery &c. without his fault. Conn. D. 2<sup>nd</sup>.  
Eib. 1 Anst 392.

Plff is allowed his reasonable expenses.  
Conn. 2<sup>nd</sup> Eib. 1 Anst 392 - Secus if Plff in his own  
wrong, as disseisor of infant, 1 Leon 129. Conn. 2<sup>nd</sup>.  
E. 1302 - So a Receiver 1 Anst 1722.

When the award  
is returned to the Ct final judg<sup>t</sup> is rendered for  
the sum awarded - & in Conn. the fees of the aud<sup>r</sup>  
are made a part of the bill of costs, but are to be paid  
at the time of rendering the award, by the successful  
party. St. Con. 37. 2 Swift 159, and

aud<sup>r</sup>s are not appoin-  
ted in Conn. in actions before single ministers of  
the law - he takes the acc<sup>t</sup> himself, - the Ct does not  
authorize him to appoint auditors, anc. sub.

In act<sup>n</sup>  
of book debt for more than \$10, the Ct in Conn. may  
appoint aud<sup>r</sup>s & proceed in act<sup>n</sup> of acc<sup>t</sup>. St. Con. 37.  
An appeal in Conn. from judg<sup>t</sup> given in Ct. in the  
award of auditors. St. Con. 37.

In Eng the act<sup>n</sup> of acc<sup>t</sup> is  
not in much use - the common remedy is in Ch<sup>cy</sup>  
for in Ct of Law in Eng<sup>d</sup>. plff is not entitled to discov-  
ery of books, papers &c nor to dep<sup>t</sup> oath. 1 Bac 153 M  
434 381 2. 448. Wats 226.

The Ct of Conn has virtually given to  
aud<sup>r</sup>s all the powers of Chancery in this respect - If  
either party is dissatisfied with the award, he may apply  
for

Account  $\frac{1}{2}$  apply to the Ct for relief. Stat 21.

the award

may be set aside if the aud<sup>r</sup>s exceed their commission  
or mistake on their own principles. (Root 267. 413) or  
if they mistake of law or given facts. (2 Day 115). It  
in case of corruption or misbehaviour

In Linn. objas

tions to the award are made by way of amendments  
in writing, The Ct. however will not in gen<sup>l</sup> enquire  
into the facts - But for mistakes in law & subst.  
appearing on the face of the award, or from the exam-  
inat<sup>n</sup> of the aud<sup>r</sup>s in Ct. the aw<sup>d</sup> may be set aside  
Thirty 353. Root 197. 267. 8. 2 Day 115.

But as to mistakes the

Ct will enquire of the aud<sup>r</sup>s only, not of other persons or  
seas in case of misbehaviour or corruption in the  
auditors.



## Action of Debt

The legal acceptation of the word "debt" is a sum of money due by certain contract. e.g. by a bond for a determinate sum. - Note, special bargain &c. 2 Bl 154. Exp 172.

Debt lies for a sum capable of being ascertained by averment. Longo. 1 Hbl 536. / Seems in some cases, on implied contract 2 Mac. 13.

Debt lies in some cases on contract implied - but not if it is said on contract implied to pay an uncertain sum. E.g. If I sell goods & agree by parol for a fixed price debt lies. 9 Co 94. a. b. But if no fixed price debt lies not / but post / 3 Bl 155. 1 Hbl 550. / Judge Keble says it will lie in such case, the standard of value being the market price, "Ia. estimeret quod sit".

That debt lies on an implied contract to pay an uncertain sum. / post. / this seems to be so because one lately has been allowed to recover less than he sued for.

Debt on simple contract disused in Eng. by reason 1<sup>st</sup> of the wager in law 3 Bl 155. Ch. 219. / Wager in law what? See Lit 155. 3 Bl 41 &c. / after swearing that he owes nothing & compurgators swear that they believe him - Wager in L. equivalent to verdict for debt. 3 Bl 343. 2<sup>d</sup> Because if whole sum accord<sup>d</sup> to the old rule must be recovered if anything, 3 Bl 115. 219. 2 Roll 706. 2 Bl. R. 1221. Longo. 5. 702 n. 1 Hbl 249. 550. lately revived Ch. R. 219 i.e. Debt on simple contract but there was no necessity for it.







Debt & Payment was presumed.

But St. Wm gave sci. fa. in this case to show cause, why ex. n. shd not issue after a year & a day. Plff cannot take ac. n. without a sci. fa. except when ex. n. has been suspended & some other cases. 3 Bac 362. Cro J. 364. 1 Roll 399. 6 Mo 228. 1 East 283. 4

It has been questioned in Eng whether debt will not lie <sup>within</sup> after a year & a day, 1 Roll 601. that it lies after a year & 1 St. Wm. - So in 2 Bac 12. that debt is allowed on judgt. to punish debt for not payg. - as he ought to without ex. n. that plff need not be put to the expense of leg. n. by ex. n. & therefore that the ac. n. will lie within the year. So Bay, vid. East. 30. 3 M 431. 1 St. Wm. judgt. in Ch. ter. & debt on judgt. next East. ter. i.e. the next term within a year.

In Con. no time is limited for taking out ex. n. & therefore no necessity from lapse of time to bring debt on judgt. after a year & as in Eng. & also it seems to be genl. agreed, that in Con. debt on judgt. will not lie where ex. n. can be taken & the full benefit of judgt. obtained by it - Now in Con it is a <sup>discretionary</sup> & does

Thus on y other hand where ex. n. cannot be taken out, debt on judgt. will lie. & Justice & before whom he dies or is removed before ac. n. granted or satisfaction of judgt. - Plff may have ac. n. or judgt. within 5 years. If debt does not exceed \$35. it may be before another Justice - unless before County Ct. St. L. Con. 38.

So when great length of time has elapsed it will not grant ex. n. debt or sci. fa. will lie. So when full



full benefit of judgment cannot be obtained by taking ex. p. It  
deft in right ac<sup>n</sup> is abscond<sup>d</sup>, debt<sup>r</sup> & plff wishes to fasten  
judg 311. 421. To of judgment was rendered in another state  
when satisfaction cant be obtained & deft has removed into  
this state. King 177. To same when plff wishes to ob-  
tain judgment in his judgment. Last case decided in favour of  
the ac<sup>n</sup> - But if no time is fixed up ante, what  
are the rules?

ex erroneous judgment will support this action, for such judgment  
is available to all purposes untill reversed. 4 Bac 211. 42 R. 445.  
3 Wils. 345. Proot. 145. 8 Co 112 a. b.

By of Constit<sup>n</sup> of Md. full  
evidence shall be given by Ct in one state, to judgment made  
by Ct in the other state. - Can there be an enquiry in 4<sup>th</sup>  
case into 4<sup>th</sup> right cause of action? art. 4. Sup. Judge Reeve  
thinks that the very nature of our Gov<sup>t</sup> sh<sup>d</sup> determine us  
in 4<sup>th</sup> negative. & the Const<sup>n</sup> he conceives to be clearly & nothing  
so. It has been decided in Md. that yet may be such en-  
quiry. Contra in Conn. & J. R. says 5 States out of 15 have  
decided with Conn. Penn. is with Md. 1 Hall 188. 201. Feb  
202. Caines 460. King 120. 1 Johns. 425.

Secondly by decision of Md. they are put on the same foot<sup>d</sup>  
with foreign judgment, then are not m<sup>d</sup> accord<sup>d</sup> & Eng. Law  
have only found fair evid<sup>n</sup> of a legal demand. J. Goulden  
will ex J. Reeve think that the Const<sup>n</sup> must mean to  
place them on diff<sup>t</sup> foot<sup>d</sup> from wh<sup>t</sup> foreign judgment are  
as C. L. 8 Johns 173. 86. 5 ib 37. 9 Co 192. 5 Co 475.

Formerly holder of debt will not lie in a foreign judgment that  
1090. Now however settled that it will lie. but they are  
treated

Debt treated as simple contr. so far forth as they are  
examinable, the judge however itself implies a sufft  
consideration that the contract is shown by debt. Saug 1. 2 W & D 410.

Debt on debt & need not show of right cause of ac. 5 East 475m

The judge of a foreign Ct. is examinable here only, when he who  
claims the benefit of it applies to have it enforced. 2 W & D 411  
& Show 232. Ray 473. Skin 59. for it is your voluntarily submission  
to the jurisdiction of your Ct.. See when pleaded in bar.

To debt  
on such a note "null til rend" is a void plea, yet debt & on  
judge as a note does not vitiate of debt. paout patent for  
mercantile is superfluous Saug 6.

The laws of foreign countries is special as matters of fact. Cowp  
174. 5. 6 Mod 195. 2 W & D 410. In such cases like debt. 3  
East 221.

Before of present constitution of C. Ct. allowed debt on judge  
rendered in other State, it held that the evidence was to be given  
yet they held of right cause of ac. must appear in the  
debt. Kent 126. They treated such judge therefore as less than  
than foreign judge at C. L. Saug 1. Showing the right cause  
of ac. was not necessary on payment the judge alone was sufft  
consideration (anct).

Incident of concurrent with debt on foreign judge  
Saug 4. 5. 6. Int not allowed on such judge - as on a judge  
rendered here 1 East 436.

Said (Saug 6) that when incident of debt lies, debt will also lie - not  
so in all cases. E. Money paid by mistake - obtained by breach of trust  
by fraud - goods of property committed by a person not owner 3 Bar  
1100.



1100, 35. The rule is to be understood in gen. (Hemmer) of express  
promises to pay money & of those implied from an actual con-  
tract. Ex. Sale of goods without an express promise - Service  
rendered without express promise. Deb. will debt lie, ante  
1840 550. Ashme & J. Gould think debt will lie.

On a writ  
judgt. debt lies not. - Ex. judgt. obtained by fraud i.e. fraud in  
the process. - It is a nullity. Vin ab. tit. Vacat. Ex. if the  
service is forged by plaintiff debt never having had notice. - If  
one person another has judgt. in his name. Pea. Co. 767  
Ambl 762.

So if irregularly obtained - Irregularity, what? Am. pay<sup>t</sup> of duty  
in Com. process improperly filled up in Eng. 2 Wils 341.  
2 Bl. R. 845, Lha 509, 993, 2 Wils 47. Process not returna-  
ble in a day certain. Cro. J. 514. not returnable to next  
t<sup>er</sup>. - So want of jurisdiction for the subject matter, vid.  
"False Imp<sup>r</sup>is".

In Com. on judgt. obtained by foreign attachment  
debt it is said lies not arg<sup>t</sup> this also cond<sup>d</sup>. debtor him-  
self. - the object being to draw prop<sup>t</sup> out of the hands of  
Garnishee, &c. but debt on com<sup>m</sup>. judgt. may be reco<sup>d</sup>. by  
foreign attachment stating that satisfaction of the judgt.  
cannot be obtained by exec<sup>n</sup>. Kirby 311, 421. ante

For money  
secured by bond, single bill, or recognizance. the ac<sup>n</sup>  
of debt is the only legal remedy, Esp 128, 2 Bac 13. Cro. E. 444.  
187, 508.

A bond so payable gen<sup>l</sup>. i.e. no time of pay<sup>t</sup> being  
fixed, is payable on the day of the date. 78 R. 124. When the  
consider<sup>n</sup> was that the bond be void if debt did not pay.

Deb't pay. Ck. held non payment a breach, ~~after~~ mistake  
Doug. 369.

If a bond is given cond<sup>n</sup> for the perform<sup>e</sup> of a cove<sup>n</sup>t to  
act, there is sometimes a remedy in Ck., it being necessary  
evid<sup>ence</sup> of an agreement to do the act, - but the C. L. remedy is an  
action of debt for the penalty.

In debt on bond damages may  
be given extending the penalty in certain cases, E. Trin.  
cipal & interest, surmount the penalty, 2 D.R. 388, Doug. 119.  
Bur 820, 2128, 3 Bl 438, Pow. M. 446, 146, Dunt. 232, 2 Sand  
102, 3 Bos 891, 65 R 303, 1 East 432. em. 1 W. 45, 3 Bos. Ch. 1189,  
26, 2 Bl. R. 1190, 3 East 604, 1 Day 30.

I do ~~not~~ think it <sup>now</sup> competent  
for a Ct of Law, to give damages exceed<sup>ing</sup> the penalty  
accord<sup>ing</sup> to the prin<sup>c</sup>iple of the old Ck., - but it is otherwise  
now that penalties may be changed. Ct of Eq<sup>ty</sup> in Com.  
have determined when it appears that the measure exceeds  
the penalty, interest may be allowed on the penalty.

On Cove<sup>n</sup>t to pay a sum certain debt lies tho' 1087, Bos  
591. If the cond<sup>n</sup> of the bond is that obligor render a just and  
fair acc<sup>t</sup> of mony rec<sup>d</sup> non pay<sup>ment</sup> of the sum, rec<sup>d</sup> is  
a breach Doug 367, 2 D.R. 388.

If there is a cov<sup>n</sup>t with a  
penalty, obligor has his election to sue for damages  
on cov<sup>n</sup>t broken or debt for the penalty, Law. C. 136, 2 Bur  
1045. Unless it appear that covenator was to have his  
election to do the act or pay the penalty, - in such  
case on non perform<sup>e</sup> of the act, an ac<sup>tion</sup> lies for the pen-  
alty only, 3 W. 371, Lth 533, 2 Par. 193, 4 W. 528, 1 Bro Ck 418.



Debt lies ag<sup>t</sup> an officer who has collected money for the  
shipp in ex<sup>ce</sup> 22 Pac 14. Mo, 586. Chit 220. on refusal or neg-  
lect to pay it over. - for leg<sup>it</sup> imp<sup>er</sup>is a contr<sup>o</sup> in law, &  
1884 556. Hol. 206. By the leg the orig<sup>l</sup> indebtedness is  
transferred to the shipp, as it ceases on the part of the officer

It lies for suit reserved on a case. & is the appropriate  
act<sup>n</sup> - tho' in some cases contr<sup>o</sup> is concurrent, - Ex<sup>ce</sup> 188.  
Ex<sup>ce</sup> 8. 9. 72. Not ag<sup>t</sup> a tenant at sufferance by the sh  
as he is a wrong doer & not in privity with Ex<sup>ce</sup> 188.

But debt will not lie for collect<sup>d</sup> articles levied &  
not sold for want of purchasers 2 Pac 14. Hol 206.  
Ex<sup>ce</sup> 1515. - Debt being a sum of money, &c.

But if Leg<sup>it</sup> returns  
collect<sup>d</sup> articles taken & estimate shown in his return  
at a sum suff<sup>ic</sup> to pay the debt he sh<sup>d</sup> neglect to  
~~pay~~ <sup>spec</sup> them, it w<sup>d</sup> seem that debt lies ag<sup>t</sup> him - for  
his own return shows that the debt in ex<sup>ce</sup> ought to  
be exonerated Hol 206, see q<sup>u</sup>? La Rag 1085. 2 Saund 344m.  
The rule is not very well settled - If they had been  
rescued the rule w<sup>d</sup> have been the same, - rescue is no  
excuse for the officer Hol 206, Ex<sup>ce</sup> 1514, 2 Saund 344.

The Lt. of Conn. limiting act<sup>n</sup> ag<sup>t</sup> shipp to 2 years for  
neglect or default & t<sup>er</sup>ms not to act<sup>n</sup> to recover from  
him what he has recovered on ex<sup>ce</sup> - not a neglect or  
default within the Lt. Lt Conn. 450.





## Action of Detinue.

This act<sup>n</sup> lies for the recovery of a specific personal chattel, & is in the nature of a bill in Ch<sup>cy</sup>. - & the judgment is for the restitution of the thing detained or payment of a sum certain put in in the nature of a penalty say A.R. for the damages of detention & value 1 Inst. 286. 30 H 15 L. Co J. 96. 2 Bac 45.

It is the only act<sup>n</sup> at law in wh. one gets specific relief & is of use when another gets possession of something wh. money will not replace, as family pictures - here however we have an inadequate remedy because in that act<sup>n</sup> damages are said for & they are assessed accord<sup>g</sup> to the market value of the articles & the judgment vests the property in the deft.

Detinue lies to recover any personal chattel that can be identified, not for money unless in a bag &c. 1 Phill 606. 14. 14. Com Detained 2 Bac 45. 7. 1 Inst. 286. It lies for a piece of gold of such a value as 20 £ in money. Com. Set<sup>t</sup> B. not for 20/ in money Co L 457. Co. Lit 286.

It lies in those cases only in wh. deft obtained possession lawfully - as by delivery or finding Com. Set<sup>t</sup> D. 2 Bac 45. 1 Roll 507. 2 Chapp 10 20. The act<sup>n</sup> seems to be founded on contract, & as a detinue may be joined in one act<sup>n</sup> 1 Phill St. Eds 57. 4 Bac 11. 1 Bac 28. 2 Sw 40 - You must state of the action, same as debt. 30 H 15 L. Set<sup>t</sup> to recover goods in action - Detinue lies not for money but the tender must.

Detinue must sue on his contract. 2 Bac 44. 5.  
Sholle 508. ~

Trove lies in all cases where detinue lies, but  
the rule holds not e converso - as trove lies when the  
taking was tortious. 2 Sp. D.

The reason why detinue lies  
not when the taking was tortious seems to be that  
originally a tortious taking was considered as divesting  
the owner of his prop<sup>y</sup> & in detinue p<sup>l</sup>ff must have  
the property of the thing demanded. Com. 21. 2. So  
that detinue was is no remedy in such case / But as  
that reason is done away I think the act<sup>n</sup> will now  
lie although the taking was tortious, say, (Kene). The  
better reason (says J. Gould) is that this act<sup>n</sup> is found<sup>d</sup>  
in contract, & p<sup>l</sup>ss<sup>o</sup> implied. - Loe q<sup>u</sup> ? is there any  
contract in the case of finding? 2 Sw. 20.

This action  
is disused by the reason of the wagon in Law. & the  
certainty required in describing the thing demanded  
Trove has taken the place of it under the spirit  
of the St. of West. 2d. 2 Bac 45. 10 C. 57. a Mod 281.  
Cro. Jac. 244. Yelv 178.

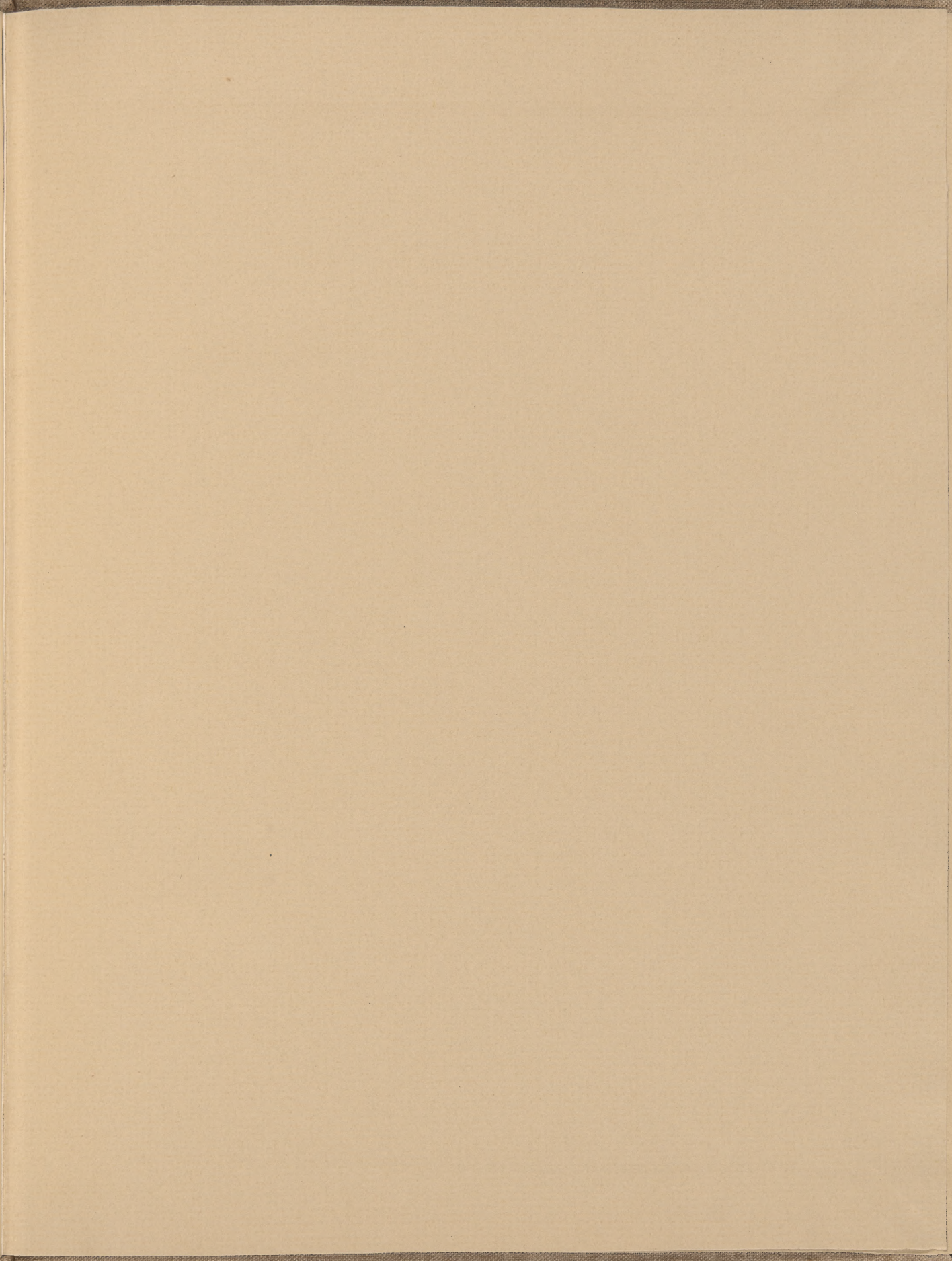
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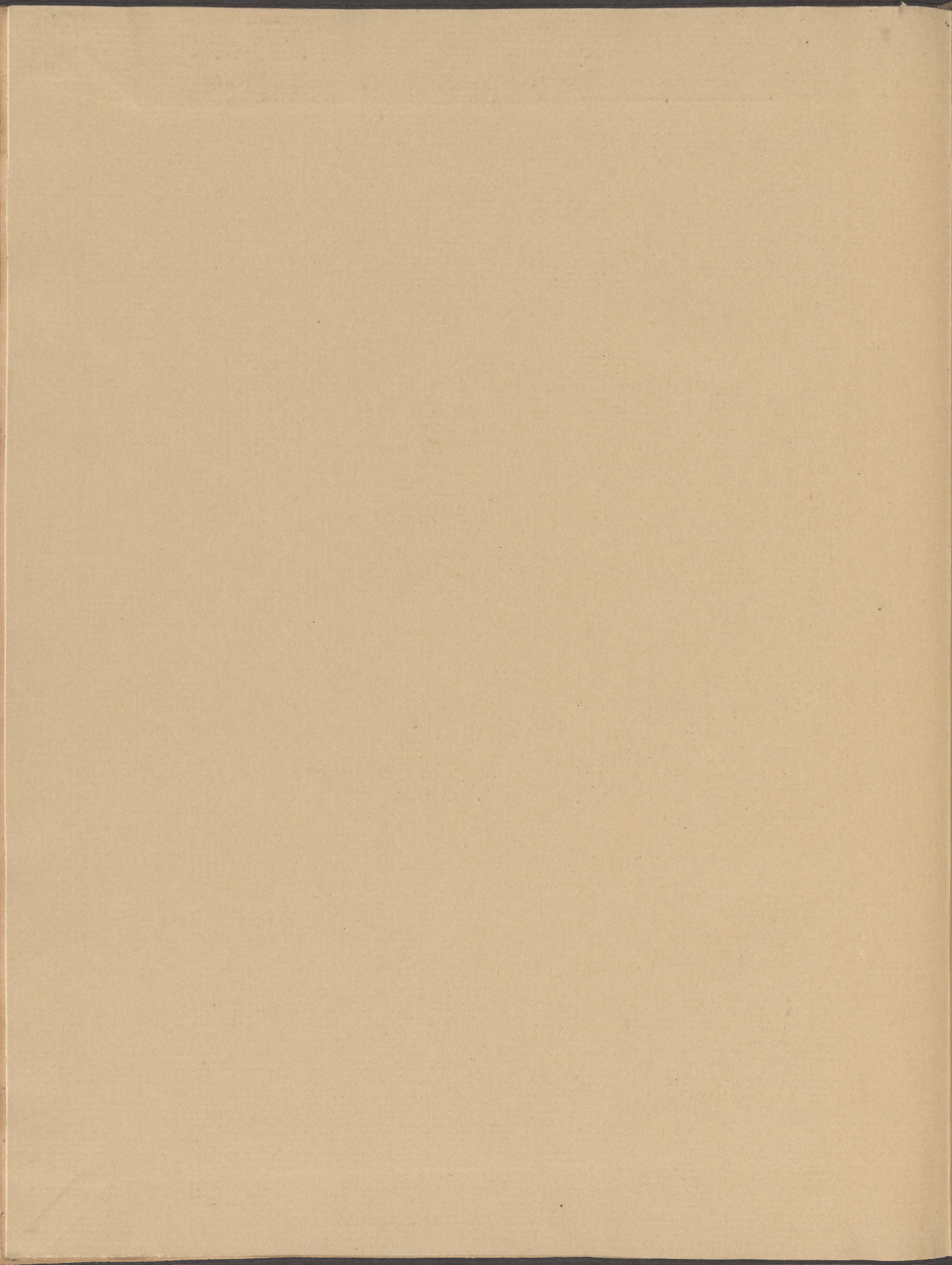














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